

2007 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, House Speaker Norelli, and Senate President Larson

FROM: Senator Jacalyn Cilley and Representative Spang, Co-chairmen

Commission Members:

Senator Jacalyn Cilley
Senator Deborah Reynolds
Senator John Barnes
Representative Judith Spang
Representative Tom Fargo
Representative David Russell
Robert Snelling, 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
Sarah Pillsbury, New Hampshire Department of Environmental Services
Terry Swain, Public Representative
David Wunsch, Joint Board of Licensure - Professional Geologists
Dennis Nesbitt, Business and Industry Association
James Griswold, New Hampshire Farm Bureau
Glenn Greenwood, New Hampshire Association of Regional Planning Commissions
Vacant, Recreational Interest

Background

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.

Senate Bill 142 was passed in 2005 and extended the life of the commission established by Senate Bill 155 of 2003 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. Senate Bill 142 further clarified the topic the commission should assess, including the concept of applying a fee for the consumptive use of water.

The 2006 Annual Interim Report summarizes the legislative history of the Groundwater Commission as well as its legislative and policy accomplishments through 2006. The 2006 Annual Interim Report also described how the commission developed a work plan in November 2005, and that the commission is using this work plan to guide and complete its work by the statutory deadline of November 30 2008. The work plan ensures the commission will address the requirements of Senate Bill 155 of 2003 and 215 of 2004.

The work plan (Attachment 1) identifies 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

For each issue, the work plan identified specific topics that needed to be analyzed by the commission. The work plan also identified a process for assessing and developing findings for the six issues. Initially, the commission would initiate a discussion on each issue at a full commission meeting. After this initial discussion, a subcommittee of the commission further researched the issue and makes recommendations to the full commission. The full commission will consider the findings of the subcommittee when it develops the final commission report in November 2008. A list of subcommittee members for 2007 is attached as Attachment 2. It should be noted that subcommittee memberships has changed some since 2006, as members have been appointed to fill various seats.

Summary of Commission Meetings in 2007

The commission conducted five meetings in 2007 up to the November 30th due date for this Annual Interim Report. Because of a significant number of vacancies on the commission after the elections in November 2006, no commission meetings were able to be conducted until the leadership in the Senate and House of Representatives in the legislature appointed new members of the commission. Additionally, commission members representing the public and Society for the Protection of New Hampshire Forests had to be appointed by the Governor to fill vacated seats. Because of vacancies on the commission, and due to a busy legislative calendar, no commission meetings occurred in December 2006 or from January through April of 2007.

The commission met on the following dates in 2007:

May 14, 2007

June 15, 2007

September 10, 2007

October 12, 2007

November 5, 2007

Scheduled meeting for December 3, 2007

Detailed meeting minutes were developed for each commission meeting and are attached as Attachment 3. A history of all commission meetings is summarized in a table also included in Attachment 3.

SUMMARY OF WORK COMPLETED BY THE COMMISSION IN 2007

Issue 1 - Groundwater Withdrawal Permitting

In 2006, the Issue 1 subcommittee completed its work and issued a report to the full commission. As described in the 2006 Annual Interim Report, the commission supported three recommendations made by the subcommittee focusing on Issue 1 and prepared language for legislators to consider for proposed legislation. The legislation recommended by the commission was acted on by legislators and in 2007 the following three bills were passed into law:

HB 457 This legislation provides municipalities with the authority to implement restrictions on the watering of residential lawns when the state or federal government have declared a stage of drought. Because water use can increase by well over 100% in the summer months primarily to support lawn watering, this legislation will provide municipalities with the ability to protect water supplies during water supply emergencies.

HB 458 This legislation allows the installation of replacement or back-up wells to be exempt from the large groundwater withdrawal permitting requirements. The legislation ensures that the operation of replacement or back-up wells will impact the environment in the same manner as the well being replaced or backed-up.

HB 459 This legislation will require that well drillers report well location in GPS coordinates, street address, and tax map and lot numbers on new water wells and deep monitoring wells that are installed. This make it easier to well records filed with NHDES to be matched with the actual well. This will improve basic hydrological data throughout the state as well as improve the accessibility of well records for the citizen's of the state.

Commission members actively participated in the legislative process for the three bills and provided testimony at committee meetings in the Senate and House of Representatives.

The full findings of the Issue 1 - Groundwater Withdrawal Permitting Subcommittee were reported in the 2006 Interim Report. The commission voted to accept the subcommittee's report at the commission meeting on September 10, 2007. The commission noted that accepting the subcommittee's report did not mean that the commission agreed with all of the findings of the subcommittee and that the commission would need to determine how to finalize its findings on Issue 1 for the Final Report of the commission which is due November 30, 2008. The most significant point of discussion regarding the findings made by the Issue 1 subcommittee pertained to large groundwater withdrawals from wells sited prior to August 1998 that are not subject to the large groundwater withdrawal permitting requirements of RSA 485-C. The Issue 1 subcommittee developed language that could be used to make a law that would subject all groundwater withdrawals from wells sited prior to August 1998 subject to a conflict resolution process administered by NHDES if a nearby domestic water user felt they were being impacted by the large withdrawal. The Issue 1 subcommittee could only find one occurrence of a pre-August 1998 well causing an unmitigated adverse impact, however, so it recommended that no changes be made to the law at this time. However, some commission members felt the issue of groundwater withdrawals from wells sited prior to August 1998 merited action for a number of reasons including: 1) New Hampshire should be proactive in ensuring withdrawals from these wells do not cause unmitigated impacts rather than waiting for problems to occur; 2) It did not make sense to some of the commission members that a large groundwater withdrawal of 57,600 gallons/24-hour period from a new well needs to obtain a permit, while the withdrawal volume from a well sited prior to August 1998 does not need to complete any impact assessment even if it increases its withdrawal volume by much more than 57,600 gallon/24-hour period; and 3) Groundwater withdrawals from wells sited prior to August 1998 could be exploited by entities citing provisions of various international trade agreements. Some commission members felt this left New Hampshire's water resources

unprotected and/or New Hampshire subject to significant financial liabilities (see commission meeting minutes from October 12, 2007 and November 5, 2007). This issue is still under discussion.

Issue 2 - Clarification of Groundwater Quantity Law and Legislative Authorities

As summarized in the 2006 Interim Report, the full commission and a subcommittee began assessing Issue 2 - Clarification of Groundwater Quantity Law and Legislative Authorities in 2006. The full commission met with three attorneys in 2006 to initiate its assessment on Issue 2 and the subcommittee met four times in 2006. On March 5, 2007, the Issue 2 subcommittee conducted its final meeting. After this meeting, the subcommittee developed its report which was submitted to the full commission at its June 15, 2007 meeting. The report contained the following information and analyses:

- A summary of New Hampshire's water law pertaining to groundwater
- A summary of the legislature's authority for regulating the use of the State's groundwater
- An assessment to determine if it is important to further clarify that groundwater is part of the Public Trust Doctrine and, if so, how is that best achieved
- An assessment of the risk to New Hampshire relating to allowing the commercial use of groundwater in products that are sold in countries that the US is in an international trade agreement with.

The full report submitted by the Issue 2 subcommittee was accepted by the commission at its June 15, 2007 meeting subject to the dates of the subcommittee meeting being added to the report. This information was added to the report and distributed at the commission's meeting on September 10, 2007. The report is attached as Attachment 4.

The key findings in the report include:

- Groundwater was in fact protected as though it were part of the public trust both by statute and under common (court/judge made) law. Accordingly, the subcommittee determined it is unnecessary to take any further action to clarify this issue.
- Relative to the risk to NH related to allowing the commercial use of groundwater in products that are sold in countries that the US is in an international trade agreement with the subcommittee report found:
 - This issue is far broader than water withdrawal regulation and would apply to all resources used in manufacturing products that are sold in countries subject to trade agreement requirements, and;
 - While there is always uncertainty on how a group of international judges will decide any case brought before them, actions to date suggest that as long as there

are clear environmental protection regulations and they are consistently applied, there is not a substantial risk that protection would be limited or compensation required by international trade agreement requirements.

- Because these agreements are new and evolving, there continues to be concerns about this issue, the subcommittee recommended that the Groundwater Commission request the Department of Justice to issue another opinion on what risk the state incurs in regulating the use of our natural resources for manufacturing products with the potential to be sold to countries that the US has trade agreements with. (Note: Since this time, the Citizens Commission on Trade was formed in 2006 via the passage of SB 162. They will be dealing directly with this and other issues concerning the impact of trade agreements in NH. The Groundwater Commission intends to track their work).

Issue 3 - Hierarchy of Water Users

Issue 3 - Hierarchy of Water Users was discussed by the full commission on May 22, 2006. The Issue 3 subcommittee began meeting in June 2007 and conducted a total of four meetings prior to November 30, 2007. The subcommittee has identified and summarized the approaches for water use hierarchy utilized by other eastern water law states. The subcommittee also met with the groundwater manager from the State of Mississippi relative to that states detailed water use hierarchy statute. As of November 30, 2007 the subcommittee is still exploring several water use hierarchy approaches New Hampshire could implement. The subcommittee is also exploring the current New Hampshire Drought Management Plan. The subcommittee intends to meet several more times before making its report to the full commission.

Issue 5 - Protecting Groundwater Quality to Ensure Availability

At the June 15, 2007 meeting, a presentation was made to the commission to initiate work on this issue. The commission agreed rather than forming a separate subcommittee to study this issue, that members of the commission would work with an advisory group of stakeholders that are assisting NHDES with updating its Source Water Protection Strategy. Work on updating this strategy has been divided into 1)Groundwater; 2)Private wells; and 3)Surface water. Commission members are currently serving on the Groundwater and Private Well Working Groups. Work on the update to the Source Water Protection Strategy will be integrated with the commission's November 30, 2008 final report.

The commission did not initiate work on Issue 4 - Fee on the Commercial Consumptive Use of Groundwater or Issue 6 - Groundwater Management Data Needs by November 30, 2007. Issue 4 was to be discussed by the commission on November 5th, and research regarding how fees are applied in other states was handed out to the commission at this

meeting. However, discussion of this issue was deferred to the December 3, 2007 meeting due to time constraints. Although the commission did not initiate work on Issue 6 in 2007, a standing statutory committee on water resources (SB162) has completed a similar task utilizing input from a cross-section of stakeholders. The commission intends to utilize this work when it addresses this issue in 2008.

In conclusion, the Groundwater Commission is continuing to methodically assess issues pertaining to the management of groundwater in New Hampshire, and its work in 2008 will continue to follow the work plan to assess ways in which New Hampshire can improve its management of groundwater resources.

Respectively Submitted,

Senator Jacalyn Cilley and Representative Spang, Co-chairmen

**Attachment 1 - Summary of the Work Plan Developed by the
Groundwater Commission in 2005**

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 2 -
Membership of Subcommittees of the Groundwater Commission**

SB 155 Commission: Subcommittee Volunteers/Members as of November 5, 2007:

1. Groundwater Withdrawal Permitting

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

2. Clarification of Groundwater Quality Law and Legislative Authorities

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

3. Hierarchy of Groundwater Users

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

4. Fee on the Commercial Consumptive Use of Groundwater

Sarah Pillsbury, Dennis Nesbit and Michelle Hamm

5. Protecting Groundwater Quality to Ensure Availability

Rep. Tom Fargo, Glenn Greenwood, Bob Snelling and Brandon
Kernen, Terry Swain (Private Well Working Group only),
Elizabeth Thomas, Senator Cilley, and Mason Westfall

6. Groundwater Management Data Needs

David Wunsch, Brian Goetz and Sarah Pillsbury

**Attachment 3 - Summaries and Minutes of Groundwater Commission
Meetings**

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"> - R Chormann – Ground water use and occurrence and the role of the New Hampshire Geological Survey - P. Currier – Status of In-stream Flow Rule - B. Kernan – Large Ground Water Withdrawal Permitting. (LGWWP) 	-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"> -Agenda -Binder on the LGWWP process and case studies prepared by DES
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"> -Agenda -Subcommittee member list -Copy of SB155 Interim Report -DES prepared chart of interim report issues -Current news articles <p>Forwarded after the first meeting:</p> <ul style="list-style-type: none"> - NH Water Data Summary -Summary of SB162 meetings -Link to USGS Aquifer Study -Information on capital budget request for monitoring well network improvements - Explanation of how a new large withdrawal is accommodated in an area with an existing permitted large withdrawal.
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 Issue 1 subcommittee - Groundwater Withdrawal Permitting. A presentation by the subcommittee was provided to explain proposed legislative initiatives	Agenda PowerPoint presentation Proposed legislation
May 14, 2007	A presentation of the findings made by the Issue 1 subcommittee was provided. New commission members were briefed on the work plan of the commission.	1) Agenda; 2) Commission Membership; 3) SB 155(2003) & SB 142(2005); 4) Commission Work Plan; 5) Chart of Meetings; 6) Draft 2006 Commission Report (without appendices); 7) Issue 1 Subcommittee handouts (PowerPoint presentation, table summarizing findings, and flowcharts summarizing the history of groundwater permitting); 8) Memberships of subcommittee; 9) DES Source Water Advisory Committee (fact sheet)

<p>June 15, 2007</p>	<p>The status of 2007 legislation was provided. The findings of the Issue 2 subcommittee - Clarification of Groundwater Quantity Law and Legislative Authority was provided. A presentation initiating the Commission's work on the Issue 5 subcommittee - Protecting Groundwater Quality to Ensure Availability was provided.</p>	<p>1) Agenda; 2) 2006 Annual Interim Report; 3) 9/25/06 and 5/14/07 Meeting Minutes; 4) 2007 legislation - HB 318, HB 457, HB 458, and HB 459; 5) Issue 2 - Clarification of Groundwater Quantity Law and Legislative Authority - Draft Subcommittee Report; 6) Summary of DES Source Water Protection Strategy/Advisory Committee - list of stakeholders; and 7) Conflict resolution legislation developed by the Issue 1 Subcommittee.</p>
<p>September 10, 2007</p>	<p>The Commission continued to review of the Issue 1 subcommittee - Groundwater Withdrawal Permitting report. The adoption of local ordinances by towns to regulate groundwater withdrawals was discussed.</p>	<p>1) Agenda; 2) 06/15/07 meeting minutes; and 3) Groundwater withdrawal ordinances for the Town of Barnstead and Atkinson</p>
<p>October 12, 2007</p>	<p>The Commission finalized its review of the Issue 1 subcommittee - Groundwater Withdrawal Permitting report. The Commission met with Richard Head of the Attorney General's office to discuss legal considerations associated with regulating withdrawals from wells sited prior to August 1998.</p>	<p>1) Agenda; and 2)09/10/07 meeting minutes</p>
<p>November 5, 2007</p>	<p>The Commission discussed potential issues of concern associated with unregulated groundwater withdrawals and international trade agreements. The Commission also met with a representative from a citizen's group in the Town of Webster regarding groundwater quality and quantity concerns.</p>	<p>1) Agenda; 2) 10/12/07 meeting minutes and 3) Presentation for Issue 4 (fees - not covered at meeting due to time constraints)</p>

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**

MEETING MINUTES

Meeting Date: May 14, 2007

Prepared By: Brandon Kernen

The meeting began at 1100 AM in Room 101 at the Legislative Office Building. Below is a list of participants:

Attendance:

Name	Association
Senator Cilley	
Senator Barnes	
Senator Reynolds	
Representative Fargo	
Representative Spang	
Representative Russell	
Brian Goetz	New Hampshire Water Works Association
Terry Swain	Public Member
Jim Griswold	NH Farm Bureau
Glenn Greenwood	Rockingham Regional Planning Commission
Michelle Hamm	Business and Industry Association
Elizabeth Thomas	NH Municipal Association
Brandon Kernen	New Hampshire Department of Environmental Services
Dennis Nesbitt	Business and Industry Association
Sarah Pillsbury	New Hampshire Department of Environmental Services
David Wunsch	Joint Licensing Board
Jack Donohue	International Bottled Water Association
Mason Westfall	New Hampshire Association of Conservation Commissions

The meeting began with the election of a chairman for the Commission. The Commission unanimously elected Representative Spang and Senator Cilley to be co-chairmen. Representative Fargo was unanimously elected vice-chairman of Commission.

Sarah Pillsbury then presented an overview of the background of the Commission. She introduced new members of the Commission that replaced some of the original membership. She also explained that the Commission was established in 2003 via SB 155. She explained that the work of the Commission was extended via SB 142 in 2005, and that in accordance with this law, the Commission must complete its work by

November 30, 2008. She also explained that the Commission is currently following a work plan it developed in November 2005, which breaks the Commission's work up into six topical areas. She explained that the Commission initiates work on each topic by initializing a discussion of each at a Commission meeting. Then, a subcommittee of the Commission studies the issue thoroughly and reports back to the full Commission with recommendations. The full Commission will then further discuss the topic and make final findings. Sarah Pillsbury explained the subcommittees of the Commission have finished its work on Issue 1 and 2 of the work plan. She explained the Commission discussed Issue 3 at a Commission meeting, and that a subcommittee is preparing to start meeting to discuss this topic.

Brandon Kernen then presented the findings of the subcommittee working on Issue 1 - Groundwater Withdrawal Permitting. The findings of the subcommittee that were presented are summarized thoroughly in a table and PowerPoint presentation handed out to the Commission. During the presentation, it was clear that members of the Commission wanted to further explore two recommendations made by the subcommittee. The first item was item 9 - "Should grandfathered large groundwater withdrawals be subject to regulation or withdrawal limitations?" Senator Barnes also expressed concerns about item 14 - "Do towns need authority to impose water use restrictions for private wells during times of drought or other water supply emergencies?"

The meeting ended with a consensus that the full Commission needed to explore the issue of "Grandfathered Withdrawals" at the next Commission meeting.

Sarah Pillsbury noted that today's meeting only address items I-III of the agenda, and that agenda items IV-VII would be discussed at a future meeting. It was agreed that the Commission would attempt to schedule monthly meetings for the near term.

Handouts: 1) Agenda; 2) Commission Membership; 3) SB 155(2003) & SB 142(2005); 4) Commission Work Plan; 5) Chart of Meetings; 6) Draft 2006 Commission Report (without appendices); 7) Issue 1 Subcommittee handouts (PowerPoint presentation, table summarizing findings, and flowcharts summarizing the history of groundwater permitting); 8) Memberships of subcommittee; 9) DES Source Water Advisory Committee (fact sheet)

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

MEETING MINUTES

Meeting Date: June 15, 2007

Prepared By: Brandon Kernen

The meeting began at 1000 AM in Room 100 at the Statehouse. Below is a list of participants:

Attendance:

Name	Association
Senator Barnes	
Representative Fargo	
Representative Spang	
Representative Russell	
Brian Goetz	New Hampshire Water Works Association
Jim Griswold	NH Farm Bureau
Terry Swain	Public Member
Glenn Greenwood	Rockingham Regional Planning Commission
Elizabeth Thomas	NH Municipal Association
Brandon Kernen	New Hampshire Department of Environmental Services
Dennis Nesbitt	Business and Industry Association
Sarah Pillsbury	New Hampshire Department of Environmental Services
David Wunsch	Joint Licensing Board
Jack Donohue	International Bottled Water Association
Mason Westfall	New Hampshire Association of Conservation Commissions

The meeting began with introductions. The Commission members in attendance who were part of the Commission in 2006 unanimously approved the 2006 Annual Interim Report for the Commission. The Commission also approved the meeting minutes from 9/25/06 and 5/14/07 with the condition that Jim Griswold's name included on the list of attendees for both meetings.

Brandon Kernen updated the commission on the status of legislation it developed. He explained that all three bills (HB 457 - Drought-Watering Restrictions, HB 458 - Large Groundwater Withdrawal Replacement wells & HB 459 - Well Identification) were approved by the House and the Senate. Representative Spang noted that the filing deadline for proposed legislation for the 2008 legislation was in September. She asked if members of the Commission were aware of any issues that needed to be addressed legislatively. Representative Fargo noted that the Department of Environmental Services

(DES) was convening a workgroup to studies laws, regulations and policies that impact geoexchange systems. He explained that the work of this group should be followed to see if any laws needed to be amended relative to geoexchange. Representative Spang asked if the USA Springs-Supreme Court decision pointed to any area of the law that required clarification. Brandon Kernen noted that the Supreme Court's decision diminished the effect of Demonstration of Need and Water Conservation under RSA 485-C, but that this finding by the court is not too meaningful anymore because the legislature adopted new requirements for water conservation under RSA 485.61 in 2003.

Glenn Greenwood then provided an overview of the work of the Issue 2 Subcommittee - Clarification of Groundwater Quantity Law and Legislative Authority. He explained that the subcommittee focused on the following two areas:

- 1) Is it important to further clarify that groundwater is part of the Public Trust Doctrine and, if so, how is that best achieved; and
- 2) Is there a risk to NH related to allowing the commercial use of groundwater in products that are sold in countries that the US is in an international trade agreement with?

He distributed a draft report of the subcommittee and explained that the subcommittee found there are a multitude of legal references that clearly show that groundwater is a shared resource not an owned piece of property. He stated that the subcommittee determined that existing case law - especially the 2006 USA Springs Supreme Court Case adequately addressed the first focus area.

He explained that the subcommittee obtained all available data it could regard its second area of focus - international trade. For its work in this focus area the subcommittee found:

1. The issue of international trade to be far broader than water withdrawal regulation and would apply to all resources used in manufacturing products that are sold in countries subject to trade agreement requirements; and
2. While there is always uncertainty on how a group of international judges will decide any case brought before them, actions to date suggest that as long as there are clear environmental protection regulations and they are consistently applied, there is not a substantial risk that protection would be limited or compensation required by international trade agreement requirements.

He explained that because trade agreements are new and evolving, there continues to be concerns about this issue, the subcommittee recommends that the Groundwater Commission request the Department of Justice to issue another opinion on what risk the state incurs in regulating the use of our natural resources for manufacturing products with the potential to be sold to countries that the US has trade agreements with. Sarah Pillsbury stated that she could draft a request for an opinion from the Department of

Justice and distribute it to members of the Groundwater Commission to ensure all of the questions commission members are interested in are being asked. Also, she stated that we should coordinate efforts and share information with a newly established commission that will be studying issues relative to international trade established by SB 162 of 2007.

The Commission voted to approve the Issue 2 Subcommittee report once the dates of the meetings for the subcommittee are included in the report. The Commission also agreed that a request for an opinion on international trade should be pursued.

Sarah Pillsbury then provided a summary of the work of the Issue 3 Subcommittee. She noted that the first subcommittee meeting occurred on June 12th and that Jack Donohue was unanimously elected chairman. She stated that she is providing an update to the Commission because Jack Donohue had a family medical emergency to tend to and could not make the meeting today. She explained that the subcommittee agreed to focus on the following items listed in the Commissions work plan for the Issue 3 Subcommittee:

- 1) Identify and review the purpose and structure of other state's hierarchies.
- 2) 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?
- 3) 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?

She explained that the subcommittee was reviewing laws and regulations for other states that have adopted water use hierarchies. She explained that the subcommittee scheduled two meetings for July (July 17th and 27th). At the July 27th meeting she explained that the Groundwater Manager from the state of Mississippi would be in attendance to discuss Mississippi's water use hierarchy statutes. She explained that Mississippi has one of the most detailed laws addressing water use hierarchy in the United States.

Sarah Pillsbury then initiated a discussion about the Issue 5 Subcommittee - Protecting Groundwater Quality to Ensure Availability and DES' Source Water Protection Strategy Update. She provided a handout that summarized the objective of DES' Source Water Protection Strategy and a list of stakeholders that will be assisting with the development of the strategy. She explained that the advisory committee would be meeting with DES on June 17th to begin work on the strategy. She gave a presentation to the Commission that summarized the work DES has completed under the guidance of previous strategy documents. She proposed to the Groundwater Commission that the Issue 5 Subcommittee members complete its work with the advisory committee that is working with DES to update its Source Water Protection Strategy. Commission members agreed that the Issue 5 Subcommittee should complete its work within the context of DES' Source Water Protection Strategy. Senator Barnes requested information about the

occurrence of contamination in drinking water wells in New Hampshire. DES agreed it would compile this information.

Brandon Kernen then provided a summary of the Issue 1 Subcommittee's work (Groundwater Withdrawal Permitting) regarding grandfathered large groundwater withdrawals. Commission members had requested this item be addressed at the Commission meeting based on information provided at the 5/14/07 Commission meeting. He handed out legislation that the subcommittee drafted, but ultimately did not recommend the Groundwater Commission act upon. The legislation developed by the subcommittee would have established a process for conflict resolution administered by DES when a grandfathered large groundwater withdrawal impacts private drinking water sources. He handed out a summary of all of the alleged impacts caused by grandfathered large withdrawals and noted that in all but one case, conflicts among water users were resolved. Representative Fargo explained that when considering if to recommend the legislation, he asks himself: 1) Is there is a problem; 2) Does the legislation fix the problem; and 3) Does the legislation create unintended consequences? Representative Fargo did not feel that there was evidence to show that grandfathered large withdrawals are causing a problem. He also expressed some concern about DES administering a conflict resolution process. Other Commission members felt that although there is no evidence grandfathered withdrawal are currently causing unmitigated adverse impacts, that this could change in the future. Some Commission members suggested existing water users that increase withdrawal rates by any amount or by more than 57,600 gallons/24-hour period be required to obtain a large groundwater withdrawal permit. Brandon Kernen stated that historic water use data reported to the state varies in accuracy, and that the new law passed in 2005 is now being implemented to require metering and accurate water use reporting. Jim Griswold stated that he is concerned about applying new laws or regulations to pre-existing water users and that changing the rules on them could be considered a taking. It was agreed that DES would e-mail the Commission a list of grandfathered large withdrawals and a list of nondomestic wells installed since 1984 that have a capacity to sustain a withdrawal over 57,600 gallons/24-hour period. The Commission agreed to dedicate forty minutes to this topic at its next meeting,

The Commission agreed to tentatively schedule the next full commission meeting for 9/10/07 at 1000 AM. The meeting was adjourned at noon.

Handouts: 1) Agenda; 2) 2006 Annual Report; 3) 9/25/06 and 5/14/07 Meeting Minutes; 4) 2007 legislation - HB 318, HB 457, HB 458, and HB 459; 5) Issue 2 - Clarification of Groundwater Quantity Law and Legislative Authority - Draft Subcommittee Report; 6) Summary of DES Source Water Protection Strategy/Advisory Committee - list of stakeholders; and 7) Conflict resolution legislation developed by the Issue 1 Subcommittee.

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

MEETING MINUTES

Meeting Date: September 10, 2007

Prepared By: Brandon Kernen

The meeting began at 1000 AM in Room 100 at the Statehouse. Below is a list of participants:

Attendance:

Name	Association
Senator Barnes	
Senator Cilley	
Representative Fargo	
Representative Spang	
Representative Russell	
Brian Goetz	New Hampshire Water Works Association
Jim Griswold	NH Farm Bureau
Glenn Greenwood	Rockingham Regional Planning Commission
Michelle Hamm	Business and Industry Association
Brandon Kernen	New Hampshire Department of Environmental Services
Bob Snelling	Society for the Protection of NH Forests
David Wunsch	Joint Licensing Board
Jack Donohue	International Bottled Water Association
Mason Westfall	New Hampshire Association of Conservation Commissions

The meeting began with introductions. The Commission approved the meeting minutes from 06/15/2007.

The Commission decided to first continue the discussion regarding the regulatory requirements for groundwater withdrawals that exceed 57,600 gallons per day from wells sited prior to August 1998. The large groundwater withdrawal permitting requirements in RSA 485-C applies only to large groundwater withdrawals that were established after July 1998. Brandon Kernen explained that the Issue 1 Subcommittee - Groundwater Permitting had studied this issue. He explained that the subcommittee developed legislative language to regulate "grandfathered" large groundwater withdrawals, but decided it could not demonstrate a need for the legislation. He explained the subcommittee could only identify one instance where a grandfathered withdrawal caused an unmitigated adverse impact to occur. He explained that the draft legislation developed by the subcommittee would establish a conflict resolution process when a private well owner felt a grandfathered large withdrawal was adversely impacting their well. He

explained that a private well owner would submit a complaint to the Department of Environmental Services (DES). DES would then look at available information and if it found the complaint to be possibly legitimate, DES could order the owner of the grandfathered large withdrawal to collect additional information. If the additional information demonstrated a grandfathered withdrawal was causing an unmitigated adverse impact, DES could then order the owner of the grandfathered large withdrawal to mitigate the adverse impact at no initial capital cost to the private well owner. A copy of the text of the draft legislation for conflict resolution was provided to Commission members.

Representative Spang asked what would happen under current statute if a bottled water company purchased a property with a well that was sited prior to 1998? She asked if the bottled water company could increase the withdrawal volume of the well? Brandon Kernen responded that DES has no authority under current law to regulate grandfathered large groundwater withdrawals. He explained that a new source of bottled water, however, even if from an existing well, would have to meet regulatory standards for water quality and well location. He explained that if a grandfathered withdrawal adversely impacted water resources, DES could enforce surface water quality standards to mitigate a problem. However he explained, if a grandfathered large withdrawal adversely impacted another water user, the parties would have to seek a legal remedy through the court system by citing common law.

Mason Westfall stated that it has been determined that there are no limits for grandfathered large withdrawals and that this is a problem. Michelle Hamm explained that as Brandon stated earlier, the Issue 1 subcommittee could not identify a need for DES to regulate grandfathered large withdrawals. Mason Westfall asked if this meant we should wait for a water supply disaster to occur before taking action to regulate grandfathered large withdrawals.

Senator Cilley asked if there were 400 grandfathered withdrawals? Brandon Kernen replied he would have to check the lists the Issue 1 subcommittee prepared [Note: After the meeting, Brandon Kernen reviewed the materials prepared by the Issue 1 subcommittee. 1) The subcommittee found that there were 1090 non domestic wells sited since 1984 that have the capacity to extract more than 57,600 gallons per day based on well driller reports. It was noted that DES does not have records of wells installed before 1984. Also, the Issue 1 subcommittee made no attempt at quantifying the number of domestic wells that have a capacity to extract 57,600 gallons per day & 2) The subcommittee found that 161 entities that are registering and reporting water use utilize more than 57,600 gallons per day.] Brandon explained that some water use registration and reporting data may not be complete or accurate. He explained that the law making it clear that entities using more than 20,000 gallons per day had to register and accurately report water use was just passed in 2005 even though DES has been collecting water use data since 1988. He explained that a DES staff person has been dedicated to administering this requirement since last fall, but that it will take some time to ensure water users registering and accurately reporting water use data.

Senator Barnes stated that the Commission should seek guidance from the Attorney General's office regarding the consequences of regulating grandfathered withdrawals. Senator Cilley agreed with this suggestion.

Michelle Hamm stated that some existing regulations do apply to grandfathered withdrawals. She cited an example (Darrah Pond) where DES applied surface water quality standards. Brandon Kernen stated that these regulations are reactive and do not proactively prevent the occurrence of adverse impacts.

Representative Fargo stated that the Commission may want to consider establishing criteria for defining what a grandfathered withdrawal is. He compared this concept to the grandfathering of certain projects under the DES Wetlands Bureau, where you can replace or repair structures as long as the footprint and size of the project is not expanded. He stated a similar approach for grandfathered large withdrawals could be applied, whereby a permit could be required if an existing large groundwater withdrawal increases by more than 57,600 gallons a day.

Michelle Hamm stated that the Issue 1 subcommittee found that 85% existing large withdrawals in New Hampshire were associated with Community Water Supplies. She also stated that the Issue 1 subcommittee found that over 1000 non domestic wells with an estimated capacity to exceed 57,600 gallons per day have been installed since 1984.

Senator Cilley re-iterated Senator Barnes earlier statement that the Commission should seek advice from the Attorney General's office regarding establishing new regulatory requirements for grandfathered withdrawals. She also stated that she sees the Issue 1 subcommittee's point that only 6 grandfathered large withdrawals have caused unmitigated adverse impacts to occur, but cited that future growth in New Hampshire is a concern, especially given that 40% of the population in New Hampshire rely on their own private well. Mason Westfall agreed that we should be considering future growth when discussing grandfathered large withdrawals.

David Wunsch asked Brandon Kernen how confident are we in the estimated capacity of existing wells. Brandon responded that we are mostly relying on well completion reports based on limited pump testing by drillers. Therefore, the quality of the data is widely variable. Jack Donohue asked how confident are we in the Water Use Registration and Reporting Program's data, both in term of data accuracy and compliance with the rules. Brandon explained that the accuracy of the data is unknown, but that the new legislation adopted in 2005 along with a new position at DES that was established to enforce the requirements of the Water Use Registration and Reporting Program will correct this. Brandon also explained that he believes commercial businesses and public water systems are mostly complying with the requirements to register and report water use. He stated that he believes there is significant noncompliance with water use registration and reporting for water uses associated with agriculture, ball fields, schools, and parks.

Representative Fargo made a point that when considering concepts for regulating grandfathered wells or withdrawals, one difficulty will be determining what the capacity

of given well is. He provided an example of a well in Dover where the historic capacity of the well has changed based on nearby aggregate mining activities.

Michelle Hamm stated that when considering grandfathered withdrawals, the Commission should remember that many communities and businesses sited wells with a certain capacity and made investments in infrastructure in a manner to support future growth. She stated that it may be that the capacity of these well are not fully utilized at this time, but that there are plans to grow and fully utilize the wells in the future. She explained it would not be fair to introduce regulation for grandfathered wells that may undermine these earlier planning efforts. She also pointed out that Monadnock Paper Mills reduced water use by 50% over the last several years due to investments in water efficiency measures. She explained that it would not be fair to penalize Monadnock Paper Mill and to require them to obtain a permit if they were to increase withdrawals in the future, as they have been reducing withdrawals over time due to conservation measures.

Senator Cilley and Brian Goetz both asked what happens to the grandfathered status of wells when a property is sold. They asked can a well be used for another purpose? Brandon Kernen explained that the answer to this question is not clear, but that the simplistic interpretation of the law would suggest that DES cannot regulate these types of withdrawals. Brandon pointed to an example where a golf course bought undeveloped land that already had four wells installed when the property was being considered for a subdivision development. Because the wells were never used, DES told the golf course that a large withdrawal permit was required. Brandon explained that this position was initially challenged by the golf course. Brandon explained that given the wording of the existing statute, a court may have not agreed with DES' position.

Senator Cilley suggested that further discussion regarding grandfathered withdrawals be delayed until the next meeting when the Commission meets with a representative from the Attorney General's Office regarding this issue.

The Commission moved onto agenda item V - Update of the Issue 3 Subcommittee - Protecting Groundwater Quality to Ensure Availability. Jack Donohue explained that the subcommittee has reviewed hierarchy statutes in other eastern water law states at two meetings. He explained that one of the states with the most comprehensive statutes pertaining to hierarchy of water users is Mississippi. At a third meeting, members of the subcommittee meet with the manager of the water program from Mississippi to learn how the language of the statute is put into practice. Jack explained that the Issue 3 Subcommittee has established a web server and that he will provide logon and password information to Commission members.

After taking a five minute break, the Commission moved onto agenda item VI - Protecting Groundwater Quality to Ensure Availability. Brandon Kernen explained that the Commission previously agreed to complete work on this issue as part of DES' work on updating the Source Water Protection Strategy which includes numerous stakeholders. Brandon explained that three meetings focusing on: 1) Groundwater; 2) Surface Water;

and 3) Private Wells had been scheduled. He stated that he would send an e-mail to commission members with the date and time of the meetings.

The Commission agreed to postpone discussion of agenda item VII - Clarification of Groundwater Quantity Law and Legislative Authority until the next meeting so that Sarah Pillsbury could lead that discussion.

The Commission then moved onto item VIII of the agenda. Brandon Kernen explained that a citizen's group from Webster asked DES to provide it with a legal opinion regarding RSA 485-C - Groundwater Protection Act. He explained that there were interested in the state's interpretation of RSA 485-C:20 which states: *"Nothing in this chapter shall be deemed to preempt the authority of municipalities, under other statutes, to enact local ordinances or regulations affecting groundwater, other than groundwater withdrawals; provided, however, that requirements imposed under this chapter shall be considered as minimum."* Because nothing in RSA 485-C regulates groundwater withdrawals less than 57,600 gallons over any 24-hour period, the citizen's group wanted to know if RSA 485-C:20 means municipalities can regulate withdrawals less than that amount.

Brandon Kernen also distributed an existing ordinance adopted by the Town of Barnstead and a proposed ordinance being considered at an upcoming meeting by the Town of Hampstead. He explained that the ordinance defines the meaning of a "person" under the State and Federal Constitution and states that corporations are not considered a person under the constitution. He explained that the ordinance allows towns to regulate withdrawals by commercial entities. Senator Cilley stated she was aware of this type of ordinance and that the ordinance originated from Pennsylvania. She stated she had a paper on it that she would share with Commission members.

The Commission then addressed agenda item IX - Remaining Commission Work Tasks. Brandon Kernen explained that the Commission has not initiated work on Issue 6 - Groundwater Management Data Needs and Issue 4 - Fee on Commercial Consumptive Use of Groundwater. Representative Spang suggested that the Commission begin work on Issue 4 at its meeting in November. Representative Spang felt like much of the work associated with Issue 6 has been completed by the Senate Bill 162 Water Resources Committee. The Commission agreed with this recommendation.

At the end of the meeting, Representative Spang and Fargo provided a summary of possible 2008 legislation. Representative Fargo explained that he was going to support legislation that establishes some minimum requirements for connections to community water systems that redistribute water to a large number of connections. He explained that sometimes a large water system provides water through a meter to customers that essentially have their own water system (mobile home parks or condominium developments). He stated that after the meter connection, that there is no bacteria water quality sampling required or standard engineering requirements for these redistribution systems. He explained that the proposed legislation would only apply to redistribution systems with atmospheric storage or pumping stations. The bill would require routine

testing for bacteria, and that any upgrade or expansion of the water system comply with DES standards.

Representative Spang explained that she was told that another representative would be proposing a fee on the extraction of groundwater used for consumptive purposes.

The next meeting was scheduled for October 12, 2007 at 1000 AM.

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

DRAFT MEETING MINUTES (NOT APPROVED AS OF 11/30/2007)

Meeting Date: October 12, 2007

Prepared By: Brandon Kernen

The meeting began at 1000 AM in Room 305 of the Legislative Office Building. Below is a list of participants:

Attendance:

Name	Association
Senator Cilley	
Representative Fargo	
Representative Spang	
Jack Donohue	International Bottled Water Association
Brian Goetz	New Hampshire Water Works Association
Jim Griswold	NH Farm Bureau
Glenn Greenwood	Rockingham Regional Planning Commission
Brandon Kernen	New Hampshire Department of Environmental Services
Sarah Pillsbury	New Hampshire Department of Environmental Services
Bob Snelling	Society for the Protection of NH Forests
Mason Westfall	New Hampshire Association of Conservation Commissions

The meeting began with introductions. The Commission approved the meeting minutes from 09/10/2007.

Sarah Pillsbury then circulated a copy of a national report regarding groundwater prepared by the Groundwater Protection Council. Sarah stated that the report could also be found online at <http://www.gwpc.org/calltoaction/>.

Senator Cilley asked commission members if they had received a magazine article regarding a national effort to promote the adoption of local ordinances by municipalities to protect natural resources, including groundwater. Commission members acknowledge receiving a copy of this article via a web link provided in an e-mail sent earlier in the week. Senator Cilley stated she would like to discuss the topic with the Commission. Brandon Kernen stated that option was placed as item VIII on the agenda under "Update on Legal Opinion requests from a Webster Citizen's Group and the Town of Atkinson".

The Commission then moved onto agenda item III, "Commission evaluation of Issue 1 - Groundwater Permitting Subcommittee Findings". Brandon Kernen explained that the Commission had developed a work plan that consisted of six topics and that for each

topic the work plan listed out specific topics that needed to be evaluated by the Commission. He explained that for each topic, a subcommittee of the Commission met numerous times to develop findings for each issue and that these findings are then reported back to the Commission for consideration. Brandon explained that the Issue 1 Subcommittee presented its findings to the Commission in 2006 and in 2007, but that the Commission did not indicate if it supported Issue 1 Subcommittee's findings. A handout titled "Summary of Issue 1 Subcommittee Findings for Tasks Listed in the Commission Work Plan" was distributed to Commission members. Brandon stated that the table summarized each of the topics listed for Issue 1 - Groundwater Permitting in the work plan, and the subcommittee's finding for the issues. He explained that one of the issues - "Grandfathered Large Groundwater Withdrawals", would not be discussed until 1100 AM when Richard Head from the Department of Justice would be in attendance as previously requested by the Commission to discuss this topic.

Representative Spang suggested that Brandon Kernen lead a discussion on the findings of the Issue 1 Subcommittee by working through the table, and that other subcommittee or Commission members could provide input on each topic.

The Commission provided no comments on Topic 1 of the table. For Topic 2, Representative Fargo requested that the table be amended to show in bold type the legislative bill number and title whenever legislation is referenced for a particular topic. For Topic 3, Senator Cilley stated that findings should reference HB 1609 Pilot Groundwater Management Plan. Brandon agreed and stated that HB 1609 is also referenced in findings for Topic 6 and Topic 12. Senator Cilley stated that while she is aware that the Department of Environmental Services (DES) protects water users and resources as development occurs when issuing new large groundwater withdrawal permits, she is concerned that the process does not specifically project and protect future water needs.

Brandon Kernen summarized the subcommittee's findings for Topic 4 – "Is the role of local government in the permitting process adequate? If not, why and how should it be changed?" Representative Spang stated that she felt the subcommittee addressed this topic in the context of local participation in the permitting process and not in terms of "local control" of approving groundwater withdrawals as will be discussed on item VIII of the Commission's agenda when it discusses the local ordinance adopted by Atkinson. Representative Fargo stated that he would like to see the current efforts of some municipalities to adopt local control ordinances for water withdrawals acknowledged in Issue 1 Subcommittee's document. Sarah Pillsbury and Glenn Greenwood stated that they recall the Issue 1 Subcommittee addressing all aspects of role of local government in the large groundwater withdrawal permitting process, including the concept of municipalities having a "veto power" regarding new large groundwater withdrawals. Glenn Greenwood stated that the Issue 1 Subcommittee report should only reflect the work of the subcommittee and not additional information that the subcommittee did not discuss. He stated that because the subcommittee completed its work last year, the report may be partially out of date, but that does not mean the Commission should change the Issue 1 Subcommittee's findings. Jack Donohue stated that the Commission should not

necessarily amend the subcommittee's report, but to take the information as completed by the subcommittee and develop an approach to seek closure on the issues addressed in this report as well as issues that are being addressed in work products by other subcommittees. Senator Cilley stated that she is aware that local participation in the permitting process has been a concern and that is why the legislature amended the law to ensure municipalities had a role in a permitting process. She stated that she recently was asked to carry a bill that would give legal "standing" to stakeholders involved in the permitting process. She asked Brandon to summarize the issue of "legal standing" relative to the USA Springs Supreme Court case. Brandon stated that he did not recall the Supreme Court disregarding any arguments by stakeholders based on the issue of standing when the large groundwater withdrawal permit was appealed. He stated that he believed the standing issue came up when stakeholders appealed a bottled water approval issued under the Safe Drinking Water Act. He explained that this approval was separate of the large groundwater withdrawal permit issued in accordance with the Groundwater Protection Act, and that the bottled water approval addressed water quality concerns. Senator Cilley stated that she may meet with DES to further investigate the issue of standing and then determine if additional legislation should be filed to address this issue.

The Commission provided no comments regarding Topic 5 of the table.

The Commission then evaluated Topic 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? Brandon Kernen explained that HB 1609 from 2005 explores this concept on a pilot basis by requiring the DES to develop a groundwater management plan for a watershed in the Seacoast Region of the state. He explained that DES selected the Exeter River Watershed. Senator Cilley stated that she would like to schedule time at a future Commission meeting to discuss where progress on this project stands. It was agreed that this could be an item for the December meeting, because the agenda for the November meeting already seemed full. Sarah noted that the Commission is responsible for overseeing work on pilot study, so that the work on the study needed to be completed by the end of November 2008.

The Commission provided no comments regarding Topic 7 of the table.

The Commission provided no comments regarding Topic 8 of the table.

Representative Fargo explained for Topic 10, which looked at loopholes in the groundwater permitting process, that legislation was passed last year to clarify that a permit is required when an entity withdraws more than 57,600 gallons a day from a new well or wells at a property or place of business (discussion of Topic 9 was skipped as it was an agenda item for later in the meeting when Richard Head from the Department of Justice was present). The Commission provided no comments regarding Topics 11, 14 and 15 of the table. Representative Spang asked that the subcommittee findings for Topic 12 be revised to explain in more detail what type of measures DES takes when issuing a large groundwater withdrawal permit to ensure future water needs are protected. Representative Fargo suggested that the subcommittee findings for Topic 13 be improved

by explaining what provisions and in law and rule ensure water users and resources are protected. Senator Cilley asked DES to explain if water users required to register and report water use are complying with this requirement. Brandon Kernen explained that most high profile businesses and municipalities are registered and reporting water use. He explained that agricultural water users and withdrawals for irrigating schools, parks and ball fields are less likely to be compliant.

The Commission then moved on to discuss the subcommittee's findings on Topic 9 of the Table - "Should grandfathered large groundwater withdrawals be subject to regulation or withdrawal limitations?" Richard Head from the Department of Justice was present and was asked to answer the legal questions from the Commission. Representative Spang initiated the discussion by describing the Commission's general awareness of the sanctity of a specific activity being grandfathered from laws developed after the date an activity had initiated. She explained that the Commission is uncertain to what extent that extended to wells and groundwater withdrawals. She asked Richard what the term "grandfathering" means. She stated that wells installed before August 1998 do not require a large groundwater withdrawal permit.

Richard Head explained USA Springs Supreme Court case identifies the guiding principles that should be considered when contemplating the regulation of groundwater withdrawals not subject to current statutory requirements. He explained that the NH Supreme Court cited the following statement from the Florida Supreme Court:

"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"

He explained that from this, there are two things relevant to legislative body:

- 1) The water itself does not carry with it a property interest so the water itself is not subject to takings; and
- 2) Because water is not a property interest, the state has authority to regulate it.

He explained that if the use of the property itself (the thing above the groundwater) is so closely tied to the use of that groundwater then there could be a condemnation proceeding.

Richard Head provided an example. He explained if piece of property has a primary purpose of utilizing groundwater and is currently not regulated but if regulated it would cease to exist or be allowed to operate and therefore lose all of its value, there is a risk or question that that comes up regarding the possibility that a condemnation proceeding could occur. He explained he is not stating one way or another that a condemnation taking would occur; he is just warning that the question regarding the need for such a hearing could be raised.

Richard Head explained that you have two layers you need to look at – 1) The groundwater itself which is subject to state regulation and an eastern water law reasonable use standard; and 2) An individual owning property above the groundwater does not have an absolute right to that groundwater and only has a right to the reasonable use of the groundwater. He stated that one of the ways to address the issue of how groundwater was being used before the large withdrawal statute took effect in August 1998 is to define what a grandfathered withdrawal is in statute or rules. He explained when looking at the concept of regulating withdrawals when there is an increase in use, one aspect of that analysis should include an evaluation to determine if a water user is doing something different when the extraction of groundwater increases, or did the water user originally develop its water supply with the intent of extracting the additional amount of water. He provided an example of a condominium complex that was built in phases. At complete build-out the condominium complex would require 58,000 gallons per day. So, the developer developed the capacity to extract this amount of groundwater prior to the 1998 statute. However, the project phases were planned to be completed over many years, and so after the first phase of the project was constructed, only 10,000 gallons of water was being extracted daily. Richard explained the separate of any laws enacted by the legislature and the governor, the pumping of water would be subject to the reasonable use standard that is in place via eastern water rights common law.

Bob Snelling asked Richard Head if it is the use of the water that is grandfathered, not the well or the withdrawal? Richard explained that you need to evaluate what has gone into creating that use of water, such as what type of investments in structures or other property improvements have been made. Richard gave an example of a well being located on one property being used to pump water that is then trucked in tankers to a bottling plant five miles away. He explained that because the bottling plant can function adequately with a different source of water, there could be no taking claim involving the bottling plant itself (located five miles away) if a new law or regulation was implemented that applied to the well. Bob asked Richard Head what about the example where an existing well that predated August 1998 is being used for agricultural purposes and a water bottling facility purchases the land and uses the well for bottled water. Richard explained that one would have to look to statutes to determine if a change in ownership or change in use triggers a permitting process. Representative Fargo asked Richard if he agreed that a change in use of a water source could trigger local regulatory review processes. Richard stated that it would if the proposed new use of the water source was inconsistent with the current zoning status of the land.

Jack Donohue asked Richard Head if “grandfathered wells” is something that needs to be defined by statute to actually consider something grandfathered. Richard explained that often what is “grandfathered” is explicitly spelled out in statute, but sometimes historical activities are indirectly considered to be grandfathered when statutes do not cover them. Richard and Jack both made the point that all groundwater users are subject to common law reasonable use principals.

Glenn Greenwood stated that Richard Head's explanation that groundwater is not a property right should make the commission feel emboldened that New Hampshire can regulate withdrawals that existed before the 1998 if they increase their withdrawal to more than 57,600 gallons per day. Richard explained that there is the issue of addressing the scenario of if the new regulations or statute would require a water user to shutdown their withdrawal – what is the existing thing that exists on the real estate that relied on the withdrawal. Glenn responded that the new regulations or statute would not require an entity to shutdown. Rather, the statute or regulation would require an entity to obtain a permit if it increases its water use – not for using the same amount of water. Richard stated that you still need to consider the Supreme Court language stating that “*unless a property is rendered useless*” (see full citation in italics on page 4). Richard gave the example of the condominium complex that has only completed one phase of development, but that was planned for multiple phases of development. If the owner of the project developed sufficient water supply capacity (over 57,600 gallons per day) for full build-out of the development, but was currently only using a fraction of that amount, and the new statute allowed the developer to ultimately withdraw 50% of the water required for the development so that construction of future phases of the development had to be abandoned, there could be legal problems.

Senator Cilley explained that in Richard Head's example, above, the development would have not been able to extract groundwater under common law if it unreasonably impacted the ability of others to reasonably use groundwater at their property or if it adversely impacted the environment. Therefore, she explained, a new statute or regulation that is consistent with “reasonable use” and protecting “public trust” concepts would not be further restricting the owner of the property of the condominium development from utilizing his property, because the full build-out of the property would have violated common law and not have been allowed in the first place. Richard agreed with this statement. Richard explained what is uncertain is who has the right to go to court and argue “reasonable use” claims – is it the State or only those who are actually being affected? He stated that this is a somewhat unanswered question. He felt that the state through common law could take action via the court system against an entity whose withdrawals predates current statutory requirements if a groundwater user was draining a number of wells in region. He explained that he believes other attorneys would disagree and take the position that only those property owners with wells being impacted could take court action citing common law and reasonable use.

Representative Spang asked if it is correct that the main difference between the state requiring a permit for all grandfathered withdrawals versus relying on common law is that under a permitting process the state can require the mitigation of adverse impacts, but addressing adverse impacts through common law would require a court proceeding. Richard agreed that would be the main difference assuming that any new statute or regulation is consistent with reasonable use concepts. He again explained that there are probably a range of legal opinions from attorneys regarding the state's ability to initiate a court proceeding under common law if a groundwater withdrawal not subject to the 1998 statute impacted wells or wetlands located on private property. He explained he would argue that the State does have the ability to initiate a court action citing common law to

protect these resources, but that there are probably other attorneys that would disagree with this opinion.

Brandon Kernen stated that based on the discussion of the commission today, that he wanted to make sure everyone understands what the law currently applies to. He stated that the applicability of the law is based on when a well was sited and not when a withdrawal was initiated. He read RSA 485-C, I which states:

“No person may withdraw more than a total of 57,600 gallons of water in any 24-hour period from a well or wells sited at a single property or place of business after the effective date of this section, regardless of the number of wells sited on the property or business, without the prior approval of the department.”

Sarah Pillsbury then requested that the Commission discuss the six grandfathering scenarios it prepared at its previous meeting and that is listed on the agenda. The Commission proceeded with this recommendation and Richard Head provided the following comments on the six concepts:

- 1) *Conflict resolution (establishing a process where DES can require grandfathered large withdrawals to investigate alleged impacts and mitigate confirmed impacts).* Richard explained that he had no objection to this concept, but cautioned that there are likely others that feel there are legal issues with this concept. He explained that this caveat likely applied to all of the opinions he has will provide regarding the regulation of existing withdrawals. He also explained that the issue and discussions surrounding the earlier discussion about rendering a property useless by new regulation applies to all of the scenarios being considered.
- 2) *Requiring a permit if anyone increases their existing withdrawal from a grandfathered well by more than 57,600 gallons per day.* Richard stated he understands this concept to mean that an entity is increasing its withdrawal amount by a volume of 57,600 gallons a day. He stated that he feels this would be an acceptable statutory or regulatory provision.
- 3) *Requiring a permit for anyone that increases their withdrawal from a grandfathered well so it now exceeds 57,600 gallons/day.* Richard explained that a problem he sees that that the law and potentially the same permitting requirements could apply to someone that increase their withdrawal from 57,596 gallons a day to 57,601 gallons per day (a 5 gallon/day increase) as well as an entity that increases its withdrawal from 5 gallons per day to 57,601 gallons per day (a 57,596 gallon/day increase). Other than that issue and the caveats listed previously, he did not object to this concept.

Representative Spang explained that she thinks it would be difficult to determine or agree on when a property becomes “rendered useless”. Richard explained that he believes there is some language in the Supreme Court finding that addresses this issue in the context of environmental regulation and that he would get this information to

the Commission. Senator Cilley explained that during the last legislative session the legislature passed a bill that increased the set-back distances of solid waste landfills to rivers. She explained that the owners of a solid waste facility in Canterbury stated that the law would make land they invested in for the purpose of expanding an existing landfill useless. Senator Cilley explained that she did not agree with that because the demand for riverfront property for real estate development is quite high.

Sarah Pillsbury asked Richard Head if there would be legal problems if a law was passed requiring a large withdrawal permit for entities that increase their water use to exceed 57,600 gallons per day, but that within this law there was a partial exemption from complying with the permitting process if entities had already conducted testing. She explained that the testing would be sufficient to assess general impacts, but would not be as comprehensive as the testing and analysis required by a large withdrawal permit. Richard explained that as long as the partial exemption applied to similar classes or groups of water users, and was not designed to specifically benefit one or a very narrow group of water users, that the partial exemption would be ok.

Representative Fargo asked Richard Head if the technical and regulatory standards were developed and were more lenient than the requirements for new large groundwater withdrawals, would this present a legal problem? Richard stated that it wouldn't but the question is a technical and policy one in that it has to be determined if permitting withdrawals in this way makes sense.

Senator Cilley explained that she does not think it would be fair to create a more lenient permitting process for withdrawals from wells sited before August 1998 if they increase their withdrawal volume by more than 57,600 gallons per day. Sarah Pillsbury stated that she agreed that the current permitting process for large withdrawals established a process that stakeholders agreed was necessary to assess and mitigate impacts. Accordingly, she explained that developing a watered down version of a permitting process for grandfathered withdrawals did not make sense to her.

Jack Donohue stated that the Commission should stop using the term "Grandfathering" because the term is not defined in law. Jack suggested the Commission begin using the term "pre 1998 wells". Richard Head agreed that grandfathered wells or withdrawals exist as an informal term, because it is not actually defined in statute.

- 4) *Requiring permits for large withdrawals from grandfathered wells that have a change in use.* Richard explained that he would have to go back to the language in the Supreme Court case regarding rendering a property useless and environmental regulation before commenting on this concept.
- 5) *Dropping the "grandfathered status" of a well when a property or place of business is sold.* Richard explained that this approach may be problematic. That an entity is permitted to engage in certain activities with the water, but that as soon as the

property is sold, the same activity is regulated and becomes more restricted or potentially not permitted. He found this scenario potentially problematic.

- 6) *Dropping the “grandfathered” status of a well that has been inactive for a long period of time.* Richard explained that “long period of time” would have to be defined, but that this approach to regulation seemed acceptable.

Representative Spang and Senator Cilley thanked Richard Head for his comments and asked if he would be willing to come again. He stated he would.

Senator Cilley and Spang told the Commission that if it wanted to recommend legislation for the upcoming session, that it would need to file an LSR very soon. Senator Cilley recommended that the Issue 1 Subcommittee revisit the “grandfathering” issue again in light of the information provided by Richard Head. Brandon Kernen explained that although the subcommittee learned a lot from Richard’s comments today, that its findings were not based on believing that grandfathered withdrawals could not be regulated – so it would not likely change its finding. Senator Cilley suggested that Commission members interested in regulating grandfathered withdrawals form a new committee and meet in the next few days. She asked the Commission members to volunteer to her if interested.

The Commission voted to accept the Issue 1 Subcommittee’s report, but not to endorse all of its findings as the Commission’s findings. It was agreed the Commission needed to determine how to develop and present the results of the final Commission’s findings on Issue 1 in its final report by November 2008.

The next meeting was scheduled for November 5, 2007 at 1000 AM.

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

DRAFT MEETING MINUTES

Meeting Date: November 5, 2007

Prepared By: Brandon Kernen

The meeting began at 1000 AM in Room 100 of the State House. Below is a list of participants:

Attendance:

Name	Association
Senator Barnes	
Senator Cilley	
Representative Spang	
Jack Donohue	International Bottled Water Association
Brian Goetz	New Hampshire Water Works Association
Jim Griswold	NH Farm Bureau
Glenn Greenwood	Rockingham Regional Planning Commission
Michelle Hamm	Business and Industry Association
Brandon Kernen	New Hampshire Department of Environmental Services
Sarah Pillsbury	New Hampshire Department of Environmental Services
Elizabeth Thomas	New Hampshire Municipal Association
David Wunsch	Joint Board of Licensure - Professional Geologists

The meeting began with introductions.

The Commission agreed to defer the approval of the October 12, 2007 meeting minutes until the December Commission meeting because the minutes were distributed just prior to the meeting.

The Commission then moved on to the first item on the agenda - NAFTA/Trade Agreements/Regulation of Withdrawals from Wells Installed Prior to July 1998. Senator Cilley initiated the discussion on this topic by summarizing the discussion the Commission had with Richard Head of the Department of Justice (DOJ) at the October 12th Commission meeting. She stated that the phrase "grandfathered" has historically been used to describe the regulatory status of wells sited prior to August 1998, but that based on the information provided by Richard Head at the last Commission meeting that this phrase probably should not be used. She explained that the law is silent on the regulatory status of wells sited prior to August 1998 and that the term "grandfathered" should only be used if the statute specifically exempted wells that were installed prior to a certain date.

Senator Cilley explained that she understands that there are a large number of wells in New Hampshire that were constructed prior to August 1998 and over a thousand of these wells are owned by businesses or community water systems are able to extract more than 57,600 gallons over a 24-hour period. She noted that most of them extract very little water at this time.

Senator Cilley explained that one issue she has been working on and that concerns her deeply is the whole issue surrounding trade agreements. She stated that it is her understanding that the Issue 1 - subcommittee, which initially evaluated the concept of regulating withdrawals from wells installed prior to August 1998 for the Commission, did not consider issues pertaining to trade agreements when it made its recommendation not to establish a law to regulate withdrawals from wells constructed prior to August 1998. Senator Cilley then explained that she is pro-business and for international trade, but that certain aspects of free-trade agreements being made by the federal government present several disadvantages. She explained that she believes trade agreements that are well rounded, balanced and even handed would be a good thing for our country, but the agreements made to date have not met this criteria. Senator Cilley explained that the current trade agreements have remarkable gaps in them and that she would point out to the Commission the gaps that could potentially impact groundwater management in New Hampshire. She explained that she has filed an LSR as a placeholder to regulate certain withdrawals from wells sited prior to August 1998, and hopes that after her presentation to the Commission today, that a consensus of the Commission would support her proposed legislation.

Senator Cilley stated that trade agreements have rather dangerous language. She explained that first of all, they encumber states and municipal entities to conform to the provisions of the trade agreements. She explained the development and negotiation of trade agreements are completed by a group of people (US Trade representatives and a small body of individuals representing special interests). She described that because these stakeholders are not representative of all stakeholders and because they lack key perspectives, that the resulting trade agreements leave states and municipalities vulnerable. She explained that testimony from Bill Warren of Georgetown University and the Forum for Democracy provided testimony at the Citizen's Trade Policy Commission and explained that often people participating in free trade agreements do not have an appreciation or a real understanding of federalism. She explained that the process of the free trade agreements is that once they are formed, they enjoin states and municipalities. She said this is significant, because in most cases states do not review proposed trade agreements, understand them, or approve of them. Senator Cilley explained that New Hampshire only has one State Point of Contact (SPOC) (Dawn Wivell) for coordinating international trade matters with the federal government and that she is rarely consulted on matters pertaining to trade. Senator Cilley pointed out that the legislature in New Hampshire is not consulted when trade agreements are developed. She said that in addition to the problem of having a very small group of people developing these trade agreements in practically a non-democratic manner, that when the trade agreement takes effect and disputes among trading partners arise, that these legal

disputes occur outside of US law, the US legal system and our Constitutional legal provisions. Instead Senator Cilley explained, disputes are handled by a three person panel that may or may not have expertise regarding the dispute. She explained that the panel does not hear arguments from our lawyers and that they don't operate within any parameters that would be considered acceptable to us under our judicial system. Senator Cilley explained that she had discussions with Richard Head of the DOJ who stated he had concerns about legal processes outside of the state and federal legal system that may occur under international trade agreements.

Senator Cilley stated that another issue with trade agreements pertains to investor state or investor company relations. She explained that Sarah Pillsbury asked Bill Warren during the Citizen's Trade Policy Commission that given New Hampshire's comprehensive laws and transparent and consistently applied permitting process for new large groundwater withdrawal permitting, aren't we protected from entities taking advantage of free trade agreements to exploit our resources? He explained that although he is not knowledgeable about the details of our groundwater withdrawal permitting process, it appeared as if we were protected. Senator Cilley then explained that because our laws do not establish any process for regulating withdrawals from wells sited prior to August 1998, that withdrawals from these wells could be exploited by entities utilizing free trade agreements. She explained that should a foreign owned company purchase a group of wells sited prior to August 1998 and begin withdrawing large volumes of groundwater that ultimately impacted other water users or water resources, that court action would be required to mitigate the problem. Senator Cilley explained that the court would most likely not have the final say as has been shown in other free trade agreements. She explained that under the investor state or investor company provisions in the free trade agreements, companies have a certain expectation of their revenue stream based on their investment. She explained that under US law, that our taking law has applied to the physical concrete taking of property. She explained that if the government takes your property for any reason, the government recognizes that you have been harmed and there is a process to compensate you for that. Senator Cilley explained that US Courts have never recognized the potential for future earnings. She explained that in at least two cases that have been settled under free trade agreements, there has been a recognition of future earnings. Senator Cilley explained how dangerous the recognition of future earnings can be. Senator Cilley explained that according to Bill Warren, the best way to protect you from entities making legal claims and seeking compensation for future earnings under trade agreements, is to ensure comprehensive laws and regulations are in place before a project is proposed. She explained that if an entity begins using wells not subject to existing laws and then the State attempts to take corrective action when problems occur, it is uncertain how panels hearing disputes under free trade agreements will respond. She explained that the panel could decide that the entity withdrawing water under existing regulations had an expectation of revenue that was significantly changed when the state imposed new requirements at a later date. She explained that this may make the panel decide that the federal government is responsible for providing compensation of the loss in future earnings caused by the state requiring corrective action. Senator Cilley explained that based on everything she knows, that it is her opinion that it is an unacceptable risk to put the state of New Hampshire and the

community at risk when this risk could be eliminated by putting a layer of regulation in place to address pre-August 1998 wells.

Senator Cilley stated that Brandon Kernen and Sarah Pillsbury also attended the Citizen's Trade Policy Commission meeting and she asked them if they had any additional information to offer. Sarah stated that one thing she heard Bill Warren state is that as long as you have a clear and consistently applied regulatory process that you were probably all set. Sarah explained that the pre-August 1998 wells exist and many are under utilized. However, she explained that if the Commission is considering applying a permitting process to these wells, that we should really consider the amount of work and due diligence owners of these wells have already completed as we consider applying new requirements to them.

Senator Cilley asked Sarah Pillsbury if we had any regulatory process in place for pre-existing wells outside of taking court action. Sarah explained that we likely had sufficient regulatory authority if a public water system took over an existing well because of the statutes that require public water systems maintain safe and sustainable water supply sources. She explained that in terms of an unused well on a property that was purchased by an entity and then being used, she is not sure that any regulatory process would apply. Brandon Kernen stated that the pre-existing wells are subject to common law and that this law has been clearly and consistently applied in a transparent manner and that this could address Senator Cilley's concern about entities trying to exploit water resources utilizing provisions in free trade agreements. Senator Cilley stated that using common law required court action, and she is trying to avoid having to rely on courts to resolve these type of conflicts because it is her opinion that this is where our vulnerabilities exist under free trade agreements.

Jim Griswold asked Senator Cilley for a point of clarification. He asked if when she is referring to companies doing business under free trade agreements withdrawing water, is she really referring to bottled water? She stated that she was not and that other examples could include a beer company, juice company, bulk water supply or that just about anything that uses large quantities of water that have opened up shop as a result of free trade agreements.

Senator Barnes stated that the discussion of free trade agreements and water sounds like USA Springs to him. He stated that USA Springs initially stated that they would ship water overseas. Senator Cilley explained that the public began citing concerns about international trade during the USA Springs permitting process. She explained that one concern she has heard but is not sure if it is valid is that if NHDES required USA Springs to reduce its withdrawal (and assuming USA Springs can cite free trade agreement provision), the free trade agreements would require all other businesses in the aquifer to also reduce their withdrawal - otherwise USA Springs may have a claim under free trade agreements. Senator Cilley stated that although she is not completely sure about the validity of this concern, that after Bill Warren's testimony at the Citizen's Trade Commission hearing she felt ok with water withdrawal projects subject to the large groundwater withdrawal permitting process.

Michelle Hamm explained to Senator Cilley that some businesses, including the largest beverage manufacturer in the state obtain their water from a public water system. She asked how would it be to differentiate between users with their own water source and those who purchase large volumes of water from a water system? Senator Cilley stated that these type of issues warrant many conversations to ensure different water use scenarios are properly considered. Elizabeth Thomas asked why shouldn't the water suppliers in this instance be responsible for properly managing the resource. Sarah and Senator Cilley stated that they were responsible. Senator Cilley pointed out that many municipal systems have deeded legislative rights to the water resource. Sarah Pillsbury explained that water suppliers, long before the regulatory programs were established had a good track record at managing resources in a sustainable manner. Elizabeth explained that the relationship a public water system has with its well is analogous to the relationship a domestic well owner has with their well. She explained that this relationship is much different than the relationship a company that wants to extract and sell water for profit has with its water resource. Representative Spang stated that some public water systems are privately owned and can be sold to foreign businesses. Therefore, she explained, the lines can become blurred when trying to distinguish between a withdrawal owned by businesses and public water systems. Senator Cilley explained that under free trade agreements, you can get into trouble if you try to treat the same type of water user differently from one another. Senator Cilley explained that the free trade agreements mandated even handedness. Representative Spang expressed concern that if Senator Cilley's proposed law to regulate pre-August 1998 wells was amended to exempt public water systems, that businesses would use public water systems to get around the law. Sarah explained that public water systems are regulated under the Groundwater Protection Act and Safe Drinking Water Act and accordingly wells sited by public water systems prior to August 1998 already completed some level of sustainability assessment to meet regulatory requirements. Sarah explained that this is different than wells sited prior to August 1998 not associated with public water systems. No regulatory requirements applied to these wells.

Senator Cilley explained that she would like to describe the draft legislation she has proposed to the Commission and that she hoped to get their support. She explained that her legislation is not draconian and ensures that there is a process in place to ensure everybody at the same level and in the same consistent manner. She went on to add that some Commission members may have the position "so what if we are challenged under trade agreements". She explained that challenges are significant, even if the US wins, because up to 30 million dollars was spent by California in one trade dispute alone. She added that if it takes 30 million dollars to defend yourself in a lawsuit, it may not matter if you won the case because so much money was expended in the dispute process. Senator Cilley explained that her agenda is to ensure this type of scenario does not occur in New Hampshire. Senator Cilley explained that her bill proposed to require entities utilizing wells sited prior to August 1998 obtain large groundwater withdrawal permits if they increase their water use by 57,600 gallons over a 24-hour period. She explained the 57,600 gallon/24-hour period threshold was taken from the existing permitting threshold

volume for groundwater withdrawal from new wells. She explained that she was willing to discuss the threshold amount but was trying to be consistent.

Senator Barnes asked Senator Cilley if the legislation she is proposing would be applicable to businesses. She stated it would and asked Brandon Kernen to describe the number of wells that could be subject to the proposed law. Brandon explained that there are currently 166 currently wells that withdraw more than 57,600 gallons a day and do not require a large withdrawal permit. He explained that twenty-two of the withdrawals are associated with businesses. Brandon also explained that there are 1090 nondomestic wells that have been installed since 1984 with the capacity to withdraw more than 57,600 gallons over any 24-hour period. He noted that the population of NH has approximately doubled, so one could estimate that there are approximately 2200 nondomestic wells capable of extracting more than 57,600 gallons/24 hours period. He noted that these figures do not include the domestic wells on the list that can extract more than 57,600 gallons/24 hour period. Senator Barnes expressed his concern about the impact of Senator Cilley's proposed legislation on existing businesses. Senator Cilley responded that she did not intend for the bill to impact existing businesses unless they dramatically increased the amount of water they utilized.

Brian Goetz asked Senator Cilley how would her bill apply to a scenario such as an inactive golf course that quit extracting water twenty years ago, but now intends to build a new development using the same well it used to use or plans to reactivate the golf course? Senator Cilley stated the bill would only apply if the golf course increased its extraction volume by more the 57,600, but that she wants to find out how the Commission wants to address these issues and she'll modify the bill accordingly. Brian stated that he thinks the proposed bill could leave NHDES in a difficult position where it needs to make decisions regarding if a permit is required or not without have good historic water use data.

Sarah Pillsbury stated that that if legislation was proposed for regulating wells sited prior to August 1998, she would anticipate that it would have to build in a period where water users could demonstrate their water use for a number of years. Sarah explained that some entities probably have already developed groundwater withdrawals and had planned to ramp up the use of them as their project builds out or business developed and that requiring a new permit for something they already developed and intended to use may cause some form of hardship. Michelle Hamm explained that she is concerned that the water use data on file with NHDES is of unknown quality. She pointed out that NHDES had no authority to ensure water use was being reported accurately until 2005 and that many water users did not even need to meter their water use until this law was passed. She also pointed out that she is concerned that the law could be unfair to certain facilities. She explained that Monadnock Paper significantly invested in water efficiency and reduced water use from 1,200,000 gallons per day to 650,000 gallons per day - if they increased their withdrawal by 57,600 gallons over their current level would they need a large withdrawal permit? Michelle also explained that Monadnock Paper Mill has completed hydrogeologic studies showing that they could take up to 1,500,000 gallons per day without adversely impacting water resources. Michelle also stated that that over

regulation of groundwater withdrawals would force many businesses to increase the use of their existing surface water sources more because there is no permitting process for existing surface water withdrawals. Michelle reminded the Commission that we cannot just focus on groundwater because all water resources are interconnected.

David Wunsch explained to the Commission that regulations or laws that affect agriculture could raise interstate commerce issues. Senator Cilley explained that she is not uncomfortable with problems that might occur with instate issues - rather her concern comes from companies that have been established outside the borders of the United States developing water resource projects that are subject in trade agreements which have nontransparent resolution dispute resolution process with a process that runs counter to what we see as fair under our laws.

Senator Cilley explained that gaining a consensus from the Commission was really important to her and asked Commission members to consider the issue and offer suggestions for amending the approach to regulating withdrawals sited prior to August of 1998. Senator Cilley explained that the Commission could ask Peter Riggs or Bill Warren to meet to further discuss the issue.

Jim Griswold explained that some of the information conveyed today resonates with him, such as having appointed people on international judiciary boards making decisions for us, but he needs time to think about what harm the proposed legislation could have.

Sarah Pillsbury explained that that the examples of trade disputes provided at the Citizen's Trade Policy Commission have been disputes under the trade agreement that occurred when a country changed regulatory rules and processes when a foreign owned company had already initiated the regulatory application process.

Brandon Kernen stated that one issue that concerns him about the discussion the Commission is having regarding trade agreements is that the Commission and others have based all discussion and opinions regarding this topic information from two or three individuals who are aggressively marketing their view on trade agreements. Brandon stated that he has seen web sites that counter their views and thinks the Commission ought to get the opinion of an expert that may represent other opinions or interest. Senator Cilley agreed that this would be helpful but stated that the Citizen's Trade Policy Commission has not been able to identify a person with a counter view yet.

Senator Cilley stated that she should would provide the Commission with a copy of the proposed legislation by e-mail and ask members to further consider her proposal. She stated that Commission members could contact her with concerns or questions and that the proposal could be discussed again at the December Commission meeting.

Sarah Pillsbury stated that NHDES has not formed a position on this topic. She explained that one of the agency's roles is to provide assistance to legislators. So while we may be assisting legislators with the language used in proposed bills, we do so in

the capacity of providing technical support. Our assistance in these instances not infer or necessarily reflect the opinion of the agency.

Jack Donohue explained that if it is Senator Cilley's goal to obtain support for the bill from stakeholders prior to the legislative session in January, that she should begin the process of actively meeting with and educating stakeholders. Jack explained that if stakeholders could be educated how this legislation protects them, then they may not oppose the proposal of new regulatory requirements. He explained that the proposed legislation could be developed in a way that provides businesses or water systems with information that will provide them with assurances regarding the sustainability or long-term viability of their water resources. Jack felt that this process of getting stakeholders to understand this would take time.

Brandon Kernen stated that if the proposed used the threshold of 57,600 gallons per 24-hour period, that the threshold would be tripped on a regular basis by municipal water systems who use millions of gallons per day. Michelle Hamm suggested that a threshold based on an increase of a certain percentage of water may be a better way to determine when wells sited before August 1998 increase their withdrawal amount.

The Commission completed its discussion on the pre August 1998 wells and moved onto the next meeting agenda item. Peg Foss of Webster asked to share with the Commission concerns a citizen's group in Webster has regarding the need to protect groundwater.

Peg explained to the Commission that she works at DES but is before the Commission today on her own time and as a citizen. She explained that she is part of a local groundwater group that has formed in Webster that is concerned about the protection of the Town's water resources. Peg explained that the groundwater group read a lot of material, met with Brandon Kernen for several hours and met with their state representative to learn about groundwater issues. She stated that after completing its research, that the groundwater group had several concerns and questions.

Peg explained that the group has developed two proposed ordinances for Webster. She explained one ordinance pertains to the protection of water quality and the other ordinance pertains to the protection of water quantity. She also explained that the group had drafted four proposed bills pertaining to groundwater. She said that the group learned about the Groundwater Commission and decided to share its questions and concerns with the Commission and hold off asking their representative to introduce the bills.

Peg Foss stated it was her goal today to ask the Commission to add some topics to its work plan. Peg stated the first item the group would like to see addressed is providing concurrent/joint jurisdiction for regulating groundwater withdrawals. She explained that joint jurisdiction for other things regulated by DES is already occurring for wetlands, subsurface systems and shoreland protection. She explained that it has always been the New Hampshire way to maintain local control. Peg explained that even though this

Commission is tasked with focusing on groundwater, that she believes the state really needs to pull surface water into the discussion.

Peg explained that the Webster groundwater group is also confused about the meaning of RSA 485-C:20 which states:

485-C:20 Effect on Local Ordinances. – Nothing in this chapter shall be deemed to preempt the authority of municipalities, under other statutes, to enact local ordinances or regulations affecting groundwater, other than groundwater withdrawals; provided, however, that requirements imposed under this chapter shall be considered as minimum.

Peg explained that because all provisions regarding the regulation of groundwater withdrawals in RSA 485-C:20 pertain to withdrawals exceeding 57,600 gallons over any 24-hour period, does RSA 485-C:20: 1) Allow towns to regulate withdrawals less than 57,600 gallons over any 24-hour period; or 2) not allow towns to regulate groundwater withdrawals of any magnitude? Peg stated that the groundwater group requested an opinion from the DOJ on this issue. She explained that NHDES also asked the DOJ. However, she explained, the DOJ declined to provide comments because the interpretation of RSA 485-C:20 did not impact DES' regulatory processes. Brandon also noted that a legal opinion from the DOJ to the public means nothing formally, and any ambiguities could only be ultimately be clarified through court decisions or additional legislation.

Sarah Pillsbury asked Peg if the Town of Webster sought a legal opinion from their attorney regarding the applicability of RSA 485-C:20. Peg explained that they intend to do this, and had not done so yet because they were hoping the DOJ would have provided its opinion first.

Another issue Peg stated that the group is interested in is a groundwater and surface water withdrawal tax. Peg said that groundwater and surface water are natural resources of the town, and if people want to use it they should pay a fee just like they do for timber or aggregate mining.

The Commission then moved on to the next agenda item and was provided an update on the Issue 3 - Hierarchy of Water Users subcommittee. Jack Donohue summarized that the subcommittee had met three times and that DES had prepared two conceptual approaches for applying a hierarchy to water users. He stated that the subcommittee would soon schedule another meeting.

The Commission scheduled the next meeting for the full Commission for December 3, 2007 at 1000. An Issue 3 subcommittee meeting was scheduled for November 20, 2007 at 2:00 PM.

The Commission meeting was adjourned at noon.

**Attachment 4 -
Issue 2: Groundwater Quantity Law Subcommittee Final Report**

Date: June 15, 2007 (adopted with edits by the Groundwater Commission)

To: Groundwater Commission (SB155, Ch. 305:1, 2003 & SB142, Ch. 287, 005)

From: Glen Greenwood, Chair of Issue 2: Groundwater Quantity Law Subcommittee

Subject: Issue 2: Groundwater Quantity Law Subcommittee Final Report

This report documents the activities and findings of the Issue 2: Groundwater Quantity Law Subcommittee.

This subcommittee was chaired by Glen Greenwood. Subcommittee members included:

- Representative Judith Spang
- Representative Cooney (no longer a member)
- Representative Tom Fargo
- Jim Griswold
- Michelle Hamm
- Brian Goetz
- DES Representatives (Pillsbury, Kernen, Roy)

The full Groundwater Commission began consideration of Issue 2: Groundwater Quantity Law at the May 22, 2006 meeting. At this meeting, three attorneys were asked to give their views on the current laws governing large groundwater withdrawals. Minutes from this meeting are attached. This information was used by the subcommittee to refine topics for consideration.

The Issue 2: Groundwater Quantity Law Subcommittee met on five occasions.

The first subcommittee meeting was held on May 13, 2006. It was poorly attended. A small group discussed the option of seeking an advisory opinion from the Supreme Court on if groundwater is part of the public trust. They also brainstormed various questions and topics for the subcommittee to consider.

At the second meeting on July 10, 2006, Glen Greenwood was elected chair. After considering a variety of topics related to water quantity law, the subcommittee agreed to focus on two areas:

1. Is it important to further clarify that groundwater is part of the Public Trust Doctrine and, if so, how is that best achieved?
2. Is there a risk to NH related to allowing the commercial use of groundwater in products that are sold in countries that the US is in an international trade agreement with?

There was also general discussion regarding eastern water law which is based on the “reasonable use” standard as opposed to western water law which is based on “prior appropriation”.

The remaining meetings (October 10, 2006, November 11, 2006 and March 5, 2007) were spent considering and discussing the two focus areas described above. The following describes the issue and the actions the subcommittee recommends be taken in relation to them:

Focus Area I - Is it important to further clarify that groundwater is part of the Public Trust Doctrine and, if so, how is that best achieved?

To approach this question, several attorneys had been asked to provide testimony to the full Commission. The subcommittee reviewed the testimony of the three attorneys contained in the attached minutes and looked at existing statutes that describes groundwater as part of or in relation to the public trust (e.g. 481:1 and 485-C (as revised 2006)). The subcommittee also reviewed the recent NH Supreme Court opinion concerning USA Springs.

The subcommittee also considered the idea of requesting an opinion of the Supreme Court as to whether groundwater is part of the public trust. To pursue this idea the subcommittee developed a number of questions regarding the need for a Supreme Court opinion, with hope of having a number of different attorneys (representing different interests) respond to them. However, only two responses were received. One from Mike Walls, DES Assistant Commissioner, who believes it is not necessary to ask for an opinion and that groundwater is protected in various parts of existing statutes as though part of the public trust. The other response was from Jennifer Pattersen, from the Attorney Generals’ Office, Department of Justice, who explained why the DOJ was unable to respond to the specific questions and who provided information about the circumstances in which the court would entertain such a request.

Based on the information reviewed, the subcommittee concluded that groundwater was in fact protected as though it were part of the public trust both by statute and under common (court/judge made) law. Accordingly, they determined it is unnecessary to take any further action, in order to protect groundwater, for the benefit of the public. Key information used in making this determination includes:

Important Statutory language in 485-C and 481:1:

485-C:1 Statement of Purpose. –

I. The purpose of this chapter is to protect the natural quality of the groundwater resource of the state by assisting local groundwater protection efforts and by establishing procedures and standards for the classification and remediation of groundwater. The legislature recognizes the fundamental importance of the groundwater resource and the role of local planning and management in groundwater protection, and intends through this legislation to provide a framework for local

groundwater protection. The legislature also intends to provide for consistent, protective management and remediation of groundwater affected by regulated contaminants. The natural quality of the groundwater resource shall be preserved and protected in order that groundwater may be used for drinking water supply. Ambient groundwater quality standards shall meet drinking water standards, and the classification of groundwater shall provide opportunity for protecting groundwater of high value as a drinking water supply. The legislature recognizes that groundwater constitutes an integral part of the hydrologic cycle and that the protection of groundwater quality is necessary to preserve the integrity of surface water.

II. The legislature finds that the most effective means of preserving the existing high quality of groundwater is by identification and careful management of operations or activities which may cause contamination of groundwater if not properly conducted. Because groundwater is primarily a local resource, cities and towns should have the first opportunity to institute programs for groundwater protection within the scope of this chapter. Suppliers of water should also have this opportunity because of their vital interest in preserving the quality of their groundwater supply. 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.

485-C:3 Duties of the Department. – The department shall:

I. Maintain a ...

VI. Manage and preserve the state's groundwater on behalf of the citizens of the state, recognizing that any private use of groundwater and other public waters shall be reasonable in light of the protected interests of the general public in the use and enjoyment of groundwater and other public waters by ensuring that no unmitigated adverse impact, as defined in this chapter, occurs.

485-C:21 Approval for Large Groundwater Withdrawals. –

I. No person may withdraw ...

V-c. In order to preserve the public trust, no large groundwater withdrawal shall cause an unmitigated impact as determined by the following:

(a) Reducing the

VIII. Before the department issues a large groundwater withdrawal permit, any municipality in which a well is sited or proposed to be sited, or any municipality within the potential impact area of the proposed withdrawal pursuant to paragraph V-e, may require the department to determine that the withdrawal will not infringe on the public's use of groundwater, including any contribution to wetlands and surface waters, by ensuring that the requirements of paragraph V-c are met. The department's determination shall be based on substantial evidence and shall include the methods, evidence, and data it used to support its judgment.

481:1 Declaration of Policy. – The general court finds that an adequate supply of water is indispensable to the health, welfare and safety of the people of the state and

is essential to the balance of the natural environment of the state. Further, the water resources of the state are subject to an ever-increasing demand for new and competing uses. The general court declares and determines that the water of New Hampshire whether located above or below ground constitutes a limited and, therefore, precious and invaluable public resource which should be protected, conserved and managed in the interest of present and future generations. The state as trustee of this resource for the public benefit declares that it has the authority and responsibility to provide careful stewardship over all the waters lying within its boundaries. The maximum public benefit shall be sought, including the assurance of health and safety, the enhancement of ecological and aesthetic values, and the overall economic, recreational and social well-being of the people of the state. All levels of government within the state, all departments, agencies, boards and commissions, and all other entities, public or private, having authority over the use, disposition or diversion of water resources, or over the use of the land overlying, or adjacent to, the water resources of the state, shall comply with this policy and with the state's comprehensive plan and program for water resources management and protection.

Important Court Decisions

Although the courts have not specifically stated that groundwater is part of the public trust, they have also not stated it is not part of the public trust. In both the USA Springs decision and in other decisions referenced in the attached minutes that contain the three attorney's views, the courts have acknowledged the states authority to protect groundwater for the health and well being of the public. It is also clear that the state has very strong authority under "police powers" to regulate and protect groundwater resources.

The following excerpt from Attorney Beliveau's views contained in the attached minutes references a number of cases which supports that the courts do not view groundwater as a private property right, but rather as being subject to the "reasonable use" standard.

"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 you 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 Basset 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."

Focus Area II - Is there a risk to NH related to allowing the commercial use of groundwater in products that are sold in countries that the US is in an international trade agreement with?

There is ongoing concern that if a groundwater withdrawal permit is issued for a withdrawal for a product (e.g. bottled water) and that product is sold to a country that the United States is in a trade agreement with (e.g. North American Trade Agreement, World Trade Organization Agreements, etc), the governing bodies for these agreements could preclude the imposition of production restrictions by the state either outright or without compensation from the state.

The subcommittee considered existing information that DES had in its files including letters and articles from concerned parties. The committee also invited Save Our Groundwater to provide additional information for the subcommittee to consider. In addition, the subcommittee reviewed an informal opinion by the Department of Justice prepared in April, 2002. A list of all material considered by the subcommittee is attached. The general impression of the subcommittee is that:

1. This issue is far broader than water withdrawal regulation and would apply to all resources used in manufacturing products that are sold in countries subject to trade agreement requirements, and;
2. While there is always uncertainty on how a group of international judges will decide any case brought before them, actions to date suggest that as long as there are clear environmental protection regulations and they are consistently applied,

there is not a substantial risk that protection would be limited or compensation required by international trade agreement requirements.

Because these agreements are new and evolving, there continues to be concerns about this issue, the subcommittee recommends that the Groundwater Commission request the Department of Justice to issue another opinion on what risk the state incurs in regulating the use of our natural resources for manufacturing products with the potential to be sold to countries that the US has trade agreements with.