

**2008 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**  
**Extended by HB 1353 of 2008, chapter 176:1-176:2, laws of 2008**

**TO: Governor Lynch, House Speaker Norelli, and Senate President Larson**

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

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**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  
Bill McCann<sup>1</sup>, Public Representative  
Brian Goetz, New Hampshire Water Works Association  
Gary Abbott, Associated General Contractors  
Michelle Hamm, Business and Industry Association  
Mason Westfall, New Hampshire Association of Conservation Commissions  
Cordell Johnston<sup>1</sup>, New Hampshire Municipal Association  
Sarah Pillsbury, New Hampshire Department of Environmental Services  
Terry Swain, Public Representative  
David Wunsch, Joint Board of Licensure and Certification  
John Mills<sup>1</sup>, Business and Industry Association  
James Griswold, New Hampshire Farm Bureau  
Glenn Greenwood, New Hampshire Association of Regional Planning Commissions  
Kris Blomback<sup>1</sup>, 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

Note 1: Member was appointed to the Commission during 2008 and was not a member for the entire year.

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 and 2007 Annual Interim Report summarizes the legislative history of the Groundwater Commission as well as its legislative and policy accomplishments through 2007. 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

In addition to the six issues being studied, House Bill 1353 was passed in 2008 and extended the life of the Commission from November 30, 2008 to November 30, 2010. House Bill 1353 also requires that the Commission complete and report on the following by November 30, 2009:

*"The commission shall also study criteria, including public benefit, for the granting of large water withdrawals other than those of RSA 485-C and RSA 485-A. Consideration of this issue shall include appropriate roles for municipalities in the permitting and regulation of large groundwater withdrawals and include input from municipalities and other appropriate entities. The committee shall design an appropriate statewide monitoring plan to ensure long term sustainability of groundwater resources and participation in the development and distribution of public educational materials on the municipal role in large groundwater permitting, including local and state regulations."*

### **Summary of Commission Meetings in 2008**

The commission conducted eight meetings in 2008 up to the November 30th due date for this Annual Interim Report. During 2008, commission members representing the Municipal Association, two public members, recreational interests, the Associated General Contractors and the Business and Industry Association were replaced by new members appointed in accordance with the original provisions of SB 155 of 2003.

The commission conducted meetings on the following dates:

January 7, 2008  
February 4, 2008  
March 3, 2008  
April 14, 2008  
June 30, 2008  
August 21, 2008  
October 1, 2008  
November 12, 2008

Detailed meeting minutes were developed for each commission meeting and are attached as Attachment 2. A history of all commission meetings is summarized in a table also included in Attachment 2.

### **SUMMARY OF WORK COMPLETED BY THE COMMISSION IN 2008**

The commission substantially completed its work on Issue 1 - Groundwater Withdrawal Permitting and Issue 2 - Clarification of Groundwater Quantity Law and Legislative Authorities in 2006 and 2007. Ultimately the work of the commission on these two issues will need to be reviewed prior to developing a Final Report by November 30, 2010, as new initiatives required by the HB 1353, findings of other work plan subcommittees, legal opinions from the Attorney General's Office and opinions of new commission members are considered.

#### **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 six meetings prior to November 30, 2008. The subcommittee: 1) Identified and summarized the approaches for water use hierarchy utilized by other eastern water law states; 2) Assessed of the current Drought Management Plan establishes an appropriate hierarchy in times of temporary scarcity/drought; 3) Assessed if there needs to be a hierarchy of groundwater users for any other purpose and if so, what should it be. The subcommittee submitted and presented a draft report to the full commission at the October 21, 2008 meeting.

#### **Issue 4 - Fee on the Commercial Consumptive Use of Groundwater**

At the January 7, 2008 meeting, a presentation was made to the commission to initiate work on this issue. The presentation included a detailed summary of water use fee structures throughout the country and how the fees were utilized. The presentation also summarized historic attempts to adopt water use fees in New Hampshire. A subcommittee of the Commission has not initiated work on this issue at this time, as the Commission decided that a subcommittee for this issue should wait until Issue 6 - Groundwater Management Data Needs completes its work prior to meeting. This approach would identify what the groundwater management data needs and associated costs are, prior to assessing if and how groundwater use fees should be developed.

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

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 DES 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. In 2008, DES worked with stakeholders to form work groups to address: 1) Private well water quality sampling requirements; 2) Rock blasting impacts on water resources; 3) Management and disposal options for unused medicines; and 4) Appropriate well construction regulations and water quality sampling requirements for geo-exchange wells. DES also worked with stakeholders to revise the Alteration of Terrain regulations to encourage the infiltration of stormwater to groundwater where appropriate.

#### **Issue 6 - Groundwater Management Data Needs**

An initial subcommittee meeting occurred in 2008. The subcommittee reviewed a list of existing sources of data for water resources in New Hampshire and elected co-chairmen for the subcommittee (Robert Snelling and David Wunsch). The subcommittee is currently developing a survey to send to groundwater experts regarding data needs and priorities. The subcommittee is also summarizing the types of data other states collect to manage groundwater. It is anticipated that the subcommittee will complete its work in 2009.

#### **Work Required by HB 1353 of 2008**

The commission developed a draft approach to work to fulfill the requirements of HB 1353. The commission also developed a draft Toolkit for Land Use Planners relative to groundwater withdrawals. The document summarizes local and state authorities that ultimately impact how and where groundwater can be used. The document also summarizes the state and local partnership that exists in the state's large groundwater withdrawal permitting process.

The commission also developed and sent a memorandum to the Attorney General's office to seek assistance in interpreting state law to better understand when and to what extent municipalities can regulate groundwater. The Attorney General's office met with the commission on October 1, 2008 in response to the memorandum (see meeting minutes in Attachment 2).

The detailed discussion that occurred with the Attorney General's office documented in Attachment 2. In summary, the Attorney General provided the following information to the commission:

- 1) RSA 485-C:20 expressly preempts municipalities from regulating groundwater withdrawals that exceed 57,600 gallons over any 24-hour period. It is less clear whether RSA 485-C:20 preempts municipalities from regulating groundwater withdrawals that are less than 57,600 gallons over any 24-hour period. This area of the statute could be clarified to ensure the intent of the law is clear.
- 2) In addition to the uncertainty in the meaning of RSA 485-C:20 described above, the more restrictive a local regulation becomes, the more likely land owners will make legal claims that their property can no longer be viably used or that a property owner's common law right to reasonably use groundwater is being violated.
- 3) The legislature can enact a law that gives municipalities authority to conduct referendum voting on large groundwater withdrawal projects. The current law (RSA 485-C:20) that preempts municipalities from regulating withdrawals that exceed 57,600 gallons over any 24-hour period would have to be changed to allow referendum voting. If the effect of a law of this nature results in a violation of a property owner's common law right to reasonably use groundwater, legal challenges would be likely. Facts relating to a legal challenge of this nature would be very case specific.
- 4) A local ordinance developed pursuant to RSA 41:8 would have to be broadly interpreted to be used as the enabling authority for municipalities to regulate large groundwater withdrawals. A local ordinance would also have to be adopted using appropriate legal processes and not in conflict with state laws or the state and federal constitution.

## **SUMMARY OF WORK REMAINING FOR THE COMMISSION**

The following work must be completed by the commission:

- Issue 3. Hierarchy of Groundwater Users - The draft report on this topic developed and commented on by the commission during the October and November 2008 commission meetings needs to be finalized. It is anticipated this will occur in early 2009. This information is required in the final report of the commission which is due on November 30, 2008.

- Issue 4. Fee on the Commercial Consumptive Use of Groundwater - This issue must be studied by the commission and reported on by November 30, 2010. The commission has researched and summarized water use fee structures for other states. The commission will complete its work on this topic once the work on Issue 6 - Groundwater Management Data Needs is substantially complete.
- Issue 5. Protecting Groundwater Quality to Ensure Availability - This issue must be studied by the commission and reported on by November 30, 2010. Work regarding the protection of private wells and an assessment of land use set backs from public water supply wells was initiated in 2008 with an advisory group assisting DES. DES and the advisory group will complete these tasks and the remaining tasks (protection of future well sites and municipal/local groundwater quality protection assistance) over the next 18 months and report its recommendations to the commission for consideration.
- Issue 6. Groundwater Management Data Needs - This issue must be studied by the commission and reported on by November 30, 2010. As previously summarized in this report, a subcommittee of the commission is actively working on this issue and anticipates reporting to the full commission in 2009.
- HB 1609 of the 2006 legislative session requires that DES complete a pilot groundwater management plan in a portion of the Seacoast Region of New Hampshire. HB 1609 requires that DES report its progress on this study to the commission. To date, an outline of an approach to work has been completed. Datasets required to complete the work are anticipated to be published by the New Hampshire Geologic Survey by the end of 2008. DES anticipates completing the plan in 2009 and reporting back to the full commission.
- HB 1353 of the 2008 legislative session requires the commission to complete the following and document in a report to the Legislature by November 2009:
  - Assess and recommend criteria, including public benefit, for the granting of large groundwater withdrawal permits other than the criteria stipulated in RSA 485-C;
  - Consider the appropriate roles for municipalities in the permitting and regulation of large groundwater withdrawals and include input from municipalities and other appropriate entities;
  - Design an appropriate statewide monitoring plan to ensure long term sustainability of groundwater resources; and
  - Participate in the development and distribution of public educational materials on the municipal role in large groundwater withdrawal permitting, including local and state regulations.

The commission has initiated work on the items required by HB 1353. Educational materials on the municipal role in the large groundwater withdrawal permitting process have been developed in draft form. The Issue 6 - Groundwater Management Data needs subcommittee is developing a state-wide monitoring plan. An outline for the approach to work to consider the role of municipalities and assess additional criteria for the granting of large groundwater withdrawal permits has been developed.

In conclusion, the Groundwater Commission is continuing to methodically assess issues pertaining to the management of groundwater in New Hampshire, and its work in 2009 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**

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 and Michelle Hamm

**3. Hierarchy of Groundwater Users**

Jack Donohue, Glenn Greenwood, Brandon Kernen, Rep. Spang and  
Michelle Hamm

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

Sarah Pillsbury 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),  
Senator Cilley, and Mason Westfall

**6. Groundwater Management Data Needs**

Robert Snelling, 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"> <li>- R Chormann – Ground water use and occurrence and the role of the New Hampshire Geological Survey</li> <li>- P. Currier – Status of In-stream Flow Rule</li> <li>- B. Kernan – Large Ground Water Withdrawal Permitting. (LGWWP)</li> </ul>	-Agenda -DES Information Packet: -Groundwater in NH Fact Sheet -Drinking Water Source Protection Fact Sheet -LGWWP Fact Sheet -Ground Water & Drinking Water Strategy Update -Eastern Water Law Survey
October 22, 2003	Meeting focused on ground water quality protection. A presentation was made by Sarah Pillsbury and Paul Susca of DES	-Agenda -Presentation -DES List of prohibitions in wellhead protection areas -Drinking Water Municipal Resource Map - DES newsletter “The Source”
February 13, 2004	Meeting focused on 2 presentations. These included a Water Use Law presentation by Jennifer Patterson from the AG’s Office and a presentation by Prof. Tom Ballestero from UNH on water occurrence in New Hampshire and issues concerning the current LGWWP law.	-Agenda -Professor Ballestero’s presentation - List of issues concerning existing LGWWP law from Prof. Ballestero

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

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

Meeting Date	Meeting Description	Meeting Materials/ Handouts
March 13, 2006	The Commission received an update on the Seacoast Water Availability project	Agenda Handout of PowerPoint Presentations
May 22, 2006	The Commission completed its discussion initiated on at its January 30, 2006 meeting on Issue 1 - Groundwater Withdrawal Permitting. The Commission then initiated a discussion on Issue 3 - Hierarchy of Groundwater Users	Agenda PowerPoint Presentation Summary of water use priorities in other eastern water law states. Drought Management Plan
June 13, 2006	The Commission initiated its discussion on Issue 2 - Clarification of Groundwater Quantity Law and Legislative Authorities. Three attorneys provided overviews of the topic from the standpoint of municipalities, business and industry, and the state.	Agenda A handout summarizing prior NH water law studies and copies of the studies were provided.
September 25, 2006	The Commission received an update on the status of 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>
<p>January 7, 2008</p>	<p>The Commission reviewed a Draft of the 2007 Interim Report. The</p>	<p>1) Agenda; 2) 11/05/07 meeting</p>

	Commission then kicked off its discussion on Work Plan Task 4 - "Fees for Consumptive Uses of Water". The remainder of the meeting focused on Commission members discussing four legislative proposals that were pending in the Legislature and how the Commission could adjust its work address the issues raised by these bills.	minutes; 3) Draft 2007 Interim Report; 3) Summary of fee structures used by other states- PowerPoint Presentation; 4) Summary of historic NH proposals to establish water use fees 5) Various versions of bills being considered in the 2008 legislative session
February 4, 2008	A continuation of the discussion at the January 7, 2008 meeting regarding 2008 legislation and expanding the duties of the Groundwater Commission occurred.	1) Agenda; 2) 01/07/08 meeting minutes; 3) Various versions of bills being considered in the 2008 legislative session
March 3, 2008	A continuation of the discussion at the February 4, 2008 meeting occurred.	1) Agenda; 2) 02/04/08 meeting minutes; 3) Various versions of bills being considered in the 2008 legislative session
April 14, 2008	1) Expansion of the Groundwater Commission's duties and schedule was presented; 2) Approach to completing the work required by HB 1609- Groundwater Management Plan was presented; 3) The USGS Seacoast Water Use Report was summarized and discussed	1) Agenda; 2) 03/03/08 meeting minutes; 3) Outline for approach to work on HB 1609 Groundwater Management Plan; 4) Excerpts from the USGS Seacoast Water Use Study
June 30, 2008	The meeting primarily focused on reviewing the initial draft of a Land Use Planning - Large Groundwater Withdrawal Toolkit that was developed in response to the requirements of HB 1353 of 2008. The meeting also included a discussion on proposed changes to the large groundwater withdrawal regulations which expire in 2009.	1) Agenda; 2) 04/14/08 meeting minutes; 3) Summary of Revisions to Large Groundwater Withdrawal Rules; and 4) Draft Land Use Planning - Large Groundwater Withdrawal Tool Kit
August 21, 2008	The meeting focused on reviewing revisions to the Land Use Planning -	1) Agenda; 2) 06/30/08 meeting

	Large Groundwater Withdrawal Toolkit. The meeting included comments from experts and stakeholders that were asked to attend the Commission meeting to assist with the document. The meeting also focused on developing questions pertaining to groundwater withdrawal statutes that the Commission intends to seek clarification from the Attorney General's Office on.	minutes; 3) Draft Land Use Planning - Large Groundwater Withdrawal Tool Kit; and 4) Draft Memorandum seeking opinions from the Attorney General's Office
October 1, 2008	The Commission met with Richard Head to seek his interpretation of various statutes on the ability of a municipality to regulate groundwater in different ways. The Commission also reviewed and commented on the initial draft report issued by the Issue 3 - Hierarchy of Water Users Subcommittee.	1) Agenda; 2) 08/21/2008 meeting minutes; 3) Memorandum requesting legal opinions from the Attorney General's Office; and 4) Draft Issue 3 - Hierarchy of Water Users Report
November 12, 2008	The Commission reviewed the draft Annual Report and the legal opinions provided by Richard Head at the October 1, 2008 meeting. The Commission also discussed revisions to the Draft Issue 3 - Hierarchy of Water Users Report.	1) Agenda; 2) 10/21/2008 meeting minutes; and 3) Revisions to the Draft Issue 3 - Hierarchy of Water Users Report

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**

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**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:**

<b>Name</b>	<b>Association</b>
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**

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**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:**

<b>Name</b>	<b>Association</b>
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 study 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 Kernan 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**

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**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:**

<b>Name</b>	<b>Association</b>
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:**

<b>Name</b>	<b>Association</b>
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 withdrawals 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 Kernan 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 a 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 full 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**

**MEETING MINUTES**

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**Meeting Date:** January 7, 2008

**Prepared By:** Brandon Kernen

The meeting began at 1015 AM in Room 100 of the State House. Below is a list of participants:

**Attendance:**

<b>Name</b>	<b>Association</b>
Senator Cilley	
Representative Spang	
Representative Fargo	
Representative Russell	
Mason Westfall	New Hampshire Association of Conservation Commissions
Brian Goetz	New Hampshire Water Works Association
Jim Griswold	NH Farm Bureau
Glenn Greenwood	NH Association of Regional Planning Commissions
Michelle Hamm	Business and Industry Association
Brandon Kernen	New Hampshire Department of Environmental Services
Robert Snelling	Society for the Protection of New Hampshire's Forest
Sarah Pillsbury	New Hampshire Department of Environmental Services
Terry Swain	Public Member
David Wunsch	Joint Board of Licensure - Professional Geologists

The meeting began with a discussion of the Commission's meeting minutes from October 12, 2007. The Commission unanimously approved the minutes of this meeting.

The Commission then reviewed the meeting minutes from its November 5, 2007 meeting. Senator Cilley offered recommendations for amendments on pages 3 and 4 of the minutes. These are summarized in **bold** and ~~strikethrough~~ text below:

- 1) Page 3, 1st paragraph: "Senator Cilley explained that according to Bill Warren, the best way to protect ~~you~~ **the state, municipalities and local subdivisions thereof** 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."
- 2) Page 4, 3rd paragraph: "Senator Cilley stated that although ~~sure~~ **she** is not completely sure about the validity of this concern, that after Bill Warren's..."

- 3) Page 4, 4th paragraph: "She asked how ~~would it be to~~ one could 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 types of issues warrant many conversations to ensure different water use scenarios are properly considered.~~

The Commission unanimously approved the minutes for the meeting on November 5, 2007 with the amendments above.

The Commission then began to review its Draft 2007 Interim Report. The Commission voted to unanimously approve the report after it was amended to include as an attachment the workplan the Commission developed in 2005 as suggested by Representative Fargo. Representative Fargo stated that he would place the reports on the state website.

The Commission then moved on to the next agenda item and discussed Senator Cilley's proposed legislation (SB 402) to regulate (by requiring a large groundwater withdrawal permit from DES) withdrawals from wells sited prior to August 1998 if extraction volumes from these wells increase by more than 57,600 gallons over historic levels. As a follow-up to the November 5, 2007 Commission meeting which discussed this issue, Senator Cilley sent Commission members an e-mail with her proposed bill and background information. Senator Cilley passed out a copy of Senate Bill 402. She explained that a hearing date was not yet scheduled for this bill. She said the legislative process would take some time to complete and that this would allow the Commission members to provide her with recommendations on any changes to SB 402 that they would like to see.

Senator Cilley provided an overview of the bill. She referenced her comments from the November 5th Commission meeting. She explained that her primary objective was to have a defensible legal framework around each groundwater well that is evenly and consistently applied. She explained that establishing a regulatory process such as this was essential if we wanted to ensure our water resources would be shielded from international trade agreements. She explained that although the threshold for requiring a large withdrawal permit from pre August 1998 wells is an increase in withdrawal volume of 57,600 gallons per day in the initial version of SB 402, that she is willing to consider a different withdrawal threshold. She explained that she wants to avoid the scenario where a well that predates the applicability of requiring a large withdrawal permit triples its daily extraction volume and causes impacts to wells and water resources. She stated that under this scenario, the only way to legally mitigate impacts from the wells sited prior to August 1998, would be to go to court.

Senator Cilley stated that she is open to recommendations. For instance, she stated perhaps there are some approaches to streamlining the large groundwater withdrawal permitting process for existing water users that increase withdrawals. She then asked Commission members to comment.

David Wunsch pointed out that existing water users with wells sited before August 1998 may already be extracting a lot of water and that SB 402 would allow them to increase withdrawals by another 56,699 gallons per day without having to obtain a permit. He explained that these withdrawals may cause an adverse impact when increased by 56,699 gallons per day. Senator Cilley stated that may be true, but that common law and the court system would then take effect.

Bob Snelling stated that he understood Senator Cilley's motivation for establishing a regulatory process for pre-August 1998 wells to address concerns about international trade agreements, but he thought the more fundamental reason for establishing a regulatory process is that it makes no sense that large groundwater withdrawals from new wells require a permit, but that large withdrawals from pre-August 1998 wells do not. He also asked Senator Cilley if the conflict resolution legislation prepared by a subcommittee of the Commission would hold up to legal changes under international trade agreements. Senator Cilley explained that she felt that the conflict resolution approach has some validity, but that she felt it would leave state and municipal governments exposed to legal challenges that would be very costly to defend. She explained the more comprehensive the framework of regulatory programs that we establish, the more we are protected from international trade agreements. She noted that Richard Head of the Attorney General's Office stated that the other side of having too many legal requirements in place is that we make it very costly for entities to comply with our requirements. She explained how Richard described the need of doing a risk cost-benefit analysis when considering the development of legal requirements that are designed to protect us from legal claims under international trade agreements.

Michelle Hamm stated that there are currently 166 wells that extract more than 57,600 gallons per day. She stated that approximately twenty-two of those wells are associated with businesses and that the majority of the wells are associated with community water systems. She explained that it will cost municipalities a substantial amount of money if they need to obtain a permit for an increase in withdrawals. She explained that there are 1090 wells that we are aware of that can extract more than 57,600 gallons per day. She asked Senator Cilley if there was any way to look at the 1090 wells and see what they are being used for? She also asked Senator Cilley if there is anyway to only require a large withdrawal permit if the water user is currently not extracting more than 57,600 gallons per day now, but in the future does exceed that threshold volume. She suggested that existing withdrawals from wells sited prior to August 1998 that are currently extracting more than 57,600 gallons per day not be required to obtain a permit even if they increase their extraction rate by 57,600 gallons per day.

Bob Snelling stated that a consensus of stakeholders had identified 57,600 gallons a day as a consensus threshold in which an assessment of impacts to water users and resource needs to be completed. He stated that it is important that the Commission when considering approaches to regulating wells sited prior to 1998 be consistent and use the same increment value applied to new withdrawals.

David Wunsch stated that the list of 1090 wells able to withdraw more than 57,600 gallons per day provided to the Commission only includes wells constructed since 1985. He stated that we really do not know how many wells are installed in the state of New Hampshire.

Mason Westfall stated that he feels it is important as we try to determine how to regulate groundwater withdrawals that we include in the formula, the availability of water. Sarah Pillsbury explained that the large groundwater withdrawal permitting process being applied to new wells does account for water availability. David Wunsch stated that the hydrogeology of New Hampshire is very complex and assessing availability requires quite a bit of data. Senator Cilley explained that the pilot study DES is required to do under HB 1609 requires DES to work with stakeholders and determine the needs and demand for water into the future in a watershed in the seacoast region.

Representative Spang asked Commission members to indicate if they feel pre-August 1998 wells are not issues to be concerned about. Michelle Hamm and Jim Griswold raised their hands in response to the question. Representative Spang asked if Commission members had any recommendations on SB 402. Sarah Pillsbury stated that she needs to consult with DES management before responding to these questions. Michelle Hamm explained that if the legislation is going to move forward, the language should consider water use scenarios such as in the case of Monadnock Paper Mill's historic water use patterns. She explained that current daily water use at the facility is down due to a reduction in business in the paper industry as well as the facility's water conservation initiatives. Michelle explained that Monadnock should be allowed to use the facility's historic extraction volume in prior years to establish the threshold that would require a large groundwater withdrawal permit. Michelle also explained that she feels that if a facility has existing data assessing the availability of water and impacts associated with groundwater withdrawal, that there should be a streamlined permitting process in place. She stated that perhaps the amount of land owned should be a consideration in issuing a waiver from the permitting process. Representative Spang asked Michelle if most facilities have historic water use data. Michelle stated that the 166 existing large withdrawals from pre-August 1998 wells are likely reporting water use data to the state. Sarah confirmed that is likely the case, but that the quality of the data reported is unknown. Michelle explained that the law was amended in 2005 and a staff person was assigned at that time to ensure accurate water use data is being reported to the state. Representative Spang asked when water use data began being reported to the state. Brandon Kernen stated that in 1988 water use data began being reported to the state. He explained that because the Joint Legislative Committee on Administrative Rules objected to the rules, DES did not enforce them until the 2005 law passed.

Representative Fargo stated that the Commission needs to remember that SB 402 is a bill that looks at ensuring no unmitigated adverse impacts occur as a result of withdrawing an increased amount of water. He explained that neither the large groundwater withdrawal permit process in place now nor SB 402 addresses sustainability for the future. He explained that both can be considered some of the tools the regulator will need to assess sustainability. Representative Fargo then stated he feels SB 402 needs to establish

rulemaking authority for DES to determine historical water use in which to make determinations of when a user has increased withdrawals by 57,600 gallons over a 24-hour period. Representative Fargo also stated that SB 402 should include a petition process that allows an applicant to avoid going through the entire permitting process based on available data that addresses concerns about adverse impacts and/or other criteria such as the amount of land owned.

Sarah Pillsbury suggested that the draft legislation establishing conflict resolution for wells installed prior to August 1998 be forwarded to experts on trade agreements to see if it would provide the same protection from international trade agreements as SB 402.

Senator Cilley stated that she agreed with Michelle Hamm's point regarding Monadnock Paper about considering historic water use to determine the thresholds at which permit would be required under SB 402. She explained that she is a little concerned about the scenario where a facility references water use twenty years ago when development conditions in the area or the facilities processes were significantly different. She stated that this issue could probably be worked out. She explained that she is open to the concept of certain exceptions. Relative to conflict resolution, she explained her concern that this approach to regulating wells sited prior to August 1998 will not provide protection from international trade agreements. She stated she would ask people with credibility in issues pertaining to international trade about the conflict resolution approach. However, she stated that she did not feel that the regulatory framework would be certain enough using the conflict resolution approach and we would leave ourselves open to legal claims under international trade agreements. Sarah Pillsbury asked Brandon Kernen to summarize the conflict resolution concept to the Commission. Brandon explained that entities felt as if adverse impacts as defined by RSA 485-C:21 were occurring, that they could file a complaint with DES. DES would then investigate the complaint and could order water users to collect additional data if needed to assess the allegation. If DES found an adverse impact was occurring, the water users would propose to DES, measures to mitigate the impact. DES would then both approve and require the implementation of the measures or order different measures be implemented to mitigate the adverse impact.

David Wunsch stated that caution needs to be used when using historic water use data to establish baseline conditions. He explained, for example, that water use volumes after three wet years would be much different than water use volumes during a drought.

Brian Goetz stated asked when or what would trigger an entity to apply for a large groundwater withdrawal permit? For example, he described a water user that slightly but steadily increases water use from year to year. Would DES analyze this data and require the water user to apply for a permit as water use approached 57,600 gallons per day? He also stated that the additive use of multiple wells had to be addressed in more detail to determine when to the permitting process would be triggered based on increasing withdrawal rates in multiple wells. For instance what about the scenario where a single subdivision creates two different legal entities to avoid obtaining a large groundwater withdrawal permit - could DES require a permit then?

Representative Spang explained that she feels that it is important that new laws be as complete and explicit as possible and that requirements left to administrative agencies to address in rulemaking should be minimized to the extent possible.

Michelle Hamm asked if an assessment of the costs to the state, business and the environment associated with implementing the requirements of SB 402 will be provided. Sarah Pillsbury stated that a fiscal note for the bill would have to be attached to the bill when it is introduced. Sarah explained that DES estimates that if SB 402 is passed, that a new full time position would have to be established.

Bob Snelling stated that statutes should stipulate rulemaking authority to DES to deal with technical issues. He felt that the issue of historic water use information is a technical and credibility issue that should be addressed in rules. He also stated that any exemptions or exceptions requests relative to the permitting process would be based on technical data and the criteria for determining when exceptions or exemptions are made should be in rules.

Representative Spang stated that the Commission needed to move on to the next agenda item. She said relative to SB 402, she believes she heard from the discussion at the meeting that Senator Cilley should work with Sarah Pillsbury and Brandon Kernen to include in the language for SB 402: 1) A streamlined permitting process for increasing withdrawals from wells that were sited prior to August 1998 and for which there is data demonstrating there is plenty of water available; and 2) Details identifying how historic water use would be determined for wells sited prior to August 1998. Michelle Hamm asked Senator Cilley to follow-up with experts on trade agreements about the concept of conflict resolution. Senator Cilley stated that she would meet with DES to work on changes to SB 402. Sarah asked if the meeting could be open to anyone that is interested and Senator Cilley agreed that it should be. Representative Fargo asked if Senator Cilley could send a revised version of SB 402 to Commission members once changes were made. Senator Cilley stated that she would e-mail out a new draft when changes are made.

The meeting then moved onto the next agenda item - "Kick-Off Presentation for Work Plan Task 4 - Fees for Consumptive Uses of Water" Brandon Kernen gave a presentation summarizing the Commission's obligation to assess the issues of fee in accordance with the language of SB 155. He also explained past efforts in New Hampshire to charge a fee for water withdrawals. Lastly he summarized other fees that are applied nationally relating to water use. His PowerPoint presentation and handouts summarizing historic water use fee legislative initiatives will be incorporated by reference to these meeting minutes to summarize the information he provided to the Commission.

Representative Fargo stated that he never thought that the legislature would take something that is essentially free and try to assign value to it. He explained that now, it may not be to far fetched, when you consider the state's participation in efforts to address green house gases. Representative Fargo stated that if the charge on water use is truly

going to be a fee, that we have to have some idea of what we are going to do with the money other than just allocate it to the general fund. Representative Spang asked who wanted to be on the Issue 4 Subcommittee to study water use fees. Sarah Pillsbury, Tom Fargo, Bob Snelling, and Michelle Hamm all committed to being on the subcommittee. Representative Spang asked that all Commission members be notified of subcommittee meetings.

Representative Spang handed out copies of HB 1439 and HB 1353 and told the Commission that hearings on the two bills would be on Wednesday, January 9th. Representative Spang explained that HB 1353 would require that municipalities overlying an aquifer of a proposed withdrawal would have to approve the withdrawal by an affirmative vote of a municipal legislative body. This would mean a special town meeting would be required in towns and that for cities, the city council would have to approve the withdrawal. Representative Spang stated that the bill appears to assume that we all know where the aquifers area. Senator Cilley stated that she has sponsored a similar bill in the Senate at the request of her constituents. Representative Spang also explained that HB 1353 also proposed amending state law to allow municipalities the right of first refusal should owners of a privately owned water system decide to sell the system.

Representative Spang explained that HB 1439 would place a five year moratorium on the issuance of large groundwater withdrawal permits for bottled water. Representative Spang explained that the moratorium was intended to deal with the threat of international trade. Representative Fargo stated that one issue people should think about if they are going to the hearing for the two bills is the issue of bottled water companies purchasing their water from public water systems. Would the moratorium apply to them he wondered? He pointed out that the state does not issue permits for large water users that obtain their water from public water systems. Representative Spang explained that these bills will likely be discussed in subcommittees at the Legislature. She explained that it will be important to ensure that the Commission's work is integrated with the legislative subcommittees.

Because the Commission meeting was running late and a number of members had left the meeting, discussion on item V of the agenda - Update on Active Commission Subcommittee was deferred to the next meeting.

The next Commission meeting was scheduled for February 4th at 1000 AM. The Commission meeting was adjourned at 12:30 PM.

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

**MEETING MINUTES**

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**Meeting Date:** February 4, 2008

**Prepared By:** Brandon Kernen

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

**Attendance:**

<b>Name</b>	<b>Association</b>
Senator Barnes	
Senator Cilley	
Representative Spang	
Representative Fargo	
Mason Westfall	New Hampshire Association of Conservation Commissions
Brian Goetz	New Hampshire Water Works Association
Jim Griswold	NH Farm Bureau
Glenn Greenwood	NH Association of Planning Commissions
Michelle Hamm	Business and Industry Association
Brandon Kernen	New Hampshire Department of Environmental Services
Robert Snelling	Society for the Protection of New Hampshire's Forest
Sarah Pillsbury	New Hampshire Department of Environmental Services
Terry Swain	Public Member
David Wunsch	Joint Board of Licensure - Professional Geologists
Jack Donohue	International Bottled Water Association

The meeting began with a discussion of the Commission's meeting minutes from January 7, 2008. Terry Swain noted that the meeting minutes needed to be corrected to show that he attended the January 7th meeting. Glenn Greenwood noted that the minutes needed to be corrected to show that he represents the NH Association of Regional Planning Commissions. Bob Snelling stated that the first sentence in the third paragraph on page 3 of the minutes needed to be revised to state "Bob Snelling stated that a consensus of stake holders had identified 57,600 gallons a day as a **consensus significant** threshold in which an assessment of impacts to water users and resources needs to be completed." The Commission unanimously approved the minutes with the changes summarized above.

Representative Spang explained that this meeting would focus on pending legislation relative to groundwater currently in committees of the House and Senate instead of

addressing the Commission's work plan. She explained that she wanted to have feedback from members of the Commission on the legislation. She explained that she was particularly interested in hearing the role that members of the Commission would like to have with the bills. She explained that there is a House Bill (HB 1353) and a Senate Bill (SB 403) that propose in different ways to give municipalities control over decisions pertaining to large groundwater withdrawals. Representative Spang explained that another bill, HB 1439, proposed to put a moratorium on the granting of large groundwater withdrawal permits. She also noted that another bill, SB 402, proposed to require withdrawals from wells sited prior to August 1998 obtain a large groundwater withdrawal permit if the extraction of water from these wells increased by 57,600 gallons over any 24-hour period, as discussed at the previous Commission meeting. Representative Spang explained that she wanted to ask the Commission if they were interested in expanding its scope to study the issues being considered in the bills. She explained that the two house bills that are currently in the House Resources, Recreation and Development (RR&D) Committee have to be moved out of the committee by February 21st. She explained her concern that the technical and legal issues that need to be worked out by the RR&D committee were too extensive to be properly addressed in a short time frame - especially given that several members of the committee have had limited exposure to groundwater law and science. She explained that she was concerned that the bills in their current form could result in unintended consequences. She also described her concern that the bills would not pass because of these issues.

Representative Spang explained that the problem associated with the municipal control-groundwater bills is that the majority of people like the concept, but do not know how to go about giving control. She explained that the concept of municipal control over groundwater would represent a major legal change in how we regulate groundwater in New Hampshire. Representative Spang explained that historically people have been comfortable with the State maintaining control over groundwater regulation. She explained that recently though, there has been significant political pressure for municipalities to have more control over decisions pertaining to groundwater. She said that many people promoting local control have no problem with the Department of Environmental Services (DES) or its technical expertise on the science of groundwater. However, she explained that as Representative Kurk states, the state is not making decisions about water use policies or a hierarchy of water users. She explained that municipalities may embrace different projects that require a large groundwater withdrawal permits differently. For example a bottled water plant may be less favored by a municipality than a hospital or a large subdivision. She explained that the concerns of the municipality that are not currently addressed in how the state manages groundwater is ensuring that there is water to: a) Meet future needs for economic growth; 2) Meet water needs for future residential growth; and 3) Provide a buffer to ensure there is enough water for future users in case groundwater contamination occurs. She explained that right now, municipalities feel that a private entity could use large volumes of groundwater without benefiting the public in a meaningful way and that they would not be able to control this scenario. Representative Spang asked Sarah Pillsbury if she would like to add anything. Sarah explained that one issue raised by the Attorney General's Office about the idea of local control, is that there needs to be criteria for determining the basis

for making value judgments on proposed groundwater withdrawals. She explained that decisions about proposed groundwater withdrawals cannot be made in the absence of well founded decision making criteria because land owners to have a right to reasonably use groundwater.

Representative Fargo explained that he wanted to bring to the Commission's attention the option of adopting local ordinances that accomplish the same thing as proposed by HB 1353. He explained that many communities such as Barnstead and Atkinson are adopting these ordinances. He explained that the ordinances may or may not have holes in them, but that they are out there and no one has contested them to date. Representative Fargo explained that perhaps the Commission should investigate the legality or Constitutionality of the ordinances. Representative Fargo explained that he is aware of other communities that are considering adopting groundwater local control ordinances. He explained that he is aware of the two pilot instream flow studies and their approach to developing a hierarchy of water users and that the Commission should explore this effort. He explained that the instream flow program is establishing a process whereby water users would have to possibly use less water than they want to maintain stream flows.

Michelle Hamm suggested that when new groundwater bills are proposed that perhaps the Commission should provide the legislative committees with summaries of the Commission's work that relates to the content of a proposed bill. She explained that other than providing the legislative committees this information, the Commission should focus on completing its work plan because it is set to expire this November.

Representative Spang suggested that the Commission perhaps should agree to continue another two years to finish its existing work and specifically address the issues proposed in HB 1353 and SB 403. She explained that the Commission is a very dynamic group that is highly engaged and with a lot of expertise that is capable of addressing complicated issues pertaining to groundwater.

Senator Barnes explained that the two senate bills were scheduled to be considered in an Executive Session of the Senate Environmental Committee on February 7th. He explained that Senator Cilley sponsored the bills and that he would likely support Senator Cilley's position on the bills. He explained that he would like to see the legislative process take its course on these two bills and not be sidetracked by the Commission. He explained that he would like for the Groundwater Commission to comment on the bills, but he only recalled seeing Sarah Pillsbury and Michelle Hamm from the Groundwater Commission at the public hearing for the two bills.

Senator Cilley explained that she understands that some members of the Commission may not agree with the provisions proposed in SB 402 and 403. She explained that she is aware of this, but that legislators also need to be responsive to the concerns and requests of their constituents. This means that legislators cannot always propose legislation that is supported by the Commission. She explained that this does not mean that the importance or the relevance of the commission is diminished. Senator Cilley explained that she really would like to see SB 402 carried forward in the legislative process. She explained that

she plans to work with DES to amend the bill to incorporate the suggestions made by Commission members at its January meeting. She stated that perhaps the Commission should consider having one of the co-chairs testify at hearings pertaining to groundwater bills and explain if the majority of commission member support or oppose a given bill. She explained that it is vitally important that the Commission continues its work and that the legislature appreciates and has a lot of confidence in the Commission.

Senator Cilley explained that SB 403, which would allow municipalities to deny new large groundwater withdrawals if two thirds of the voters oppose a withdrawal is somewhat similar to HB 1353 that was proposed by Representative Kurk. She explained that perhaps these two bills warrant an in-depth analysis by the Commission because of all of the complexities associated with the local control-groundwater bills. She explained that it is apparent that all of the changes in the large groundwater withdrawal permitting process to include more local involvement have not satisfied the public that is concerned about groundwater.

Representative Fargo stated he wanted to explore the legislative process. He stated that sometimes bills that are not legally and technically correct, but propose a concept that is generally supported, get passed from one legislative body to the next. He explained that it is assumed that appropriate modifications will be made to the bill once it is passed to the other legislative body. He pointed out that even if the bills have been either approved by the House or Senate, that Commission members still have time to provide input and suggestions that can be incorporated into the bill.

In light of the fact that SB 402 was going to be considered in the Executive session of the Senate Environment Committee on February 7th, Representative Spang asked Senator Cilley if she had made any amendments to SB 402 to address the recommendations of the Groundwater Commission from its January meeting. Senator Cilley stated that she believed that SB 402 could be considered by the Senate Environment Committee at a later date than the 7th, and that she planned to meet with DES very soon to work on incorporating the suggestions of the Commission. Representative Spang asked Senator Cilley if the Commission would have a chance to consider these amendments. Senator Cilley stated that she would distribute the amendments to Commission members and seek their feedback. Sarah Pillsbury summarized that the Commission felt the following changes needed to be made to SB 402: 1) Add provisions to determine historic maximum 24-hour water use values; and 2) Add a streamlined permitting process for scenarios where historic hydrogeologic data exists documenting the sustainable withdrawal rate for a given withdrawal.

Brian Goetz suggested that we should make sure that someone from the Municipal Association is at the Commission meetings as we are considering the various legislative bills pertaining to groundwater. Sarah Pillsbury explained that Elizabeth Thomas represents the Municipal Association. Sarah Pillsbury explained that historically that the NH Municipal Association has opposed local control for large groundwater withdrawal permitting. She explained that this year, however, the Municipal Association took no position on SB 403 relative to local control of large groundwater withdrawal permitting.

Glenn Greenwood explained that he found it odd that the Municipal Association took this position this year. He noted that the permitting process has been amended multiple times to include more municipal involvement in the permitting process. He explained that that although he used to favor local control for large groundwater withdrawal permitting, that he now thinks municipal involvement in permitting decisions is good and adequate. Glenn explained that he reviewed SB 403, and does not like a simple provision of a two-thirds vote being a mechanism to approve or deny a large groundwater withdrawal. He stated that voting in this nature does not make sense when you are talking about an understood science. He explained that the Commission should only testify on bills if it has a unanimous position on issues. Otherwise, he explained, members of the Commission should represent themselves or organizations when testifying on bills. He explained that he supported extending the Commission as it is addressing one of the most important issues facing New Hampshire.

Jim Griswold explained that he did not oppose extending the Commission. He expressed concern about the Commission diverting its time and attention responding to legislative initiatives, when the Commission has a clear set of issues that it is suppose to evaluate and make recommendations on. Representative Spang explained that the issue of local control and charging fees for using water are concepts that are not going to go away until they are addressed, so it makes sense for the Commission to address these issues. Jim Griswold explained that if the Commission moves forward to address these issues, we need to make sure that the Commission's work accurately reflects the opinions of its various members. For instance he explained, with any recommendation regarding local regulation of groundwater withdrawals, he would want the Commission's findings to make it clear that the Farm Bureau, which he represents, does not support this concept. Representative Spang replied that it is the purpose of the Commission to have a mixture of viewpoints, and therefore care will be taken to ensure everyone's position is accurately reflected.

Senator Barnes stated that the Commission was about to vote on if it approved the concept of extending its life another two years before his comments took the discussion of the meeting in another direction. He recommended that the Commission members take a vote on if they wanted to extend their work another two years.

Representative Fargo asked what task would we commit to addressing if the Commission was extended another two years? He explained we already had a set of tasks that we are working on. He felt that before determining if the Commission should be extended, we should have a work plan or set of tasks that we plan to work on. Senator Barnes replied that some of the additional tasks would include making improvements to the groundwater bills currently pending in the legislature.

David Wunsch explained that in the short time he has been on the Groundwater Commission, it seems like its agendas jump around to address the hot topic of the day. He explained that he felt there was a lot of merit to making a list of items that the Commission would focus on if it was extended.

Bob Snelling explained that the only other commission that he has been active on is the Shoreland Protection Commission. He explained it was that Commission's responsibility to outline the pros and cons to various environmental protection approaches to the legislature. He explained that sometimes the Commission had a unanimous opinion and that other times it did not. He asked what is Groundwater Commission's responsibility and what happens if this is not unanimous consensus on a given issue it is assessing. Sarah Pillsbury explained that the work plan developed by the Commission stipulated that if there was not a consensus on a given issue that the range of opinions and recommendations would be documented in any work products of the Commission.

Senator Cilley explained that she wanted to respond concerns made by David Wunsch, Jim Griswold and Representative Fargo about the Commission jumping around addressing "hot button" issues. She explained while there will always be the issue of the day, that the issue of municipal involvement in the permitting process has been a long-standing issue and it makes sense for the Commission to evaluate this. She also explained that she agrees with other Commission members that sometimes when water issues arise at the local level, it is perception that is causing concerns. She feels that an important role of the Commission includes assisting DES with developing an approach to educate the public on groundwater issues. She pointed out that 99% of the time, the concern about water issues at the local level pertain to bottled water. Yet, she explained only one percent of the groundwater used in the state is for bottled water. Therefore if we have serious problem with our groundwater because of bottled water, then the other 99% of our water use in the state shows there is very significant water issues in the state. Representative Spang explained that she and Representative Kurk discussed during committee meetings for HB 1353, the need to develop a municipal tool box to summarize state regulations that provide them authority with controlling the type of projects that are built in town. She explained that the tool box could also be used to educate communities on how they can participate in the large groundwater withdrawal permitting process.

Mason Westfall asked why are municipalities asking for local control? He believes that they are asking for local control because like himself before joining the Commission, they do not understand the existing laws and regulations in place that protect water users and water resources. Mason also pointed out that he believes the Commission should complete the work it originally set out to complete and be done. He stated that with the election cycles, that the make-up of the Commission is not a constant and that the Commission may never stop re-assessing the same issues differently over and over if keeps extending itself.

Michelle Hamm stated that when bills are proposed before the legislature, the Commission should not be going to hearings and stating "the majority of the Commission supports" or the "majority of the Commission opposes" a certain bill. Rather, Michelle explained, the Commission should provide legislators with the summary of its work over the last four years that might be relevant to pending legislation.

Representative Fargo explained that he agreed with the comments of others about the need for the Commission to keep a balance of focusing on its work plan and being

responsive to pending legislation. He concurred with Michelle Hamm's comments about providing legislators with reports and records of the Commission when relevant to pending legislation pertaining to groundwater. He explained that the Commission should focus on its original charter and not expand its mission.

Sarah Pillsbury explained that it has been an interesting legislative session this year. She explained that the thing that strikes her is that there is an incredible amount of concern by the public about how much groundwater do we have and do we have enough? She explained that in moving forward, providing education and a Municipal Tool Box will be incredibly important. She stated there seems to be a very focused concern on if we have enough groundwater, because proposals for local control of water resource management have focused on groundwater. She stated that the answer to the question of if our groundwater resources are being used in a sustainable manner is the development of state-wide groundwater monitoring network. She explained that ultimately that is the only way to truly address the concern about the sustainability of our groundwater resources. She suggested that the extension of the Commission include in its objectives, the development of a state-wide monitoring network. Sarah stated that at the end of the day, the legislature can establish moratoriums, provide local control of regulating large groundwater withdrawals, and require more public involvement in the permitting process, but that none of these items can answer the question about if our groundwater is being used in a sustainable manner. She stated that if people want to sleep at night knowing what is going on with our groundwater resources, we need to start monitoring water levels. Currently, the only places where we have a good set of water level data are where there are large groundwater withdrawal permits. Sarah explained that the Commission can include within its work, recommendations on methods that can be used to fund the state-wide monitoring network.

Senator Cilley explained that the Groundwater Commission now has the institutional knowledge necessary to assist the state in developing the groundwater monitoring network and an education program. She explained that she felt the Commission's work on these two new initiatives could go a long way in alleviating the re-occurring concerns the public has about groundwater. Representative Spang added that the thing that concerns her most is that subcommittees in the legislature do not have the foundation of knowledge that Commission members have relative to the legal and technical aspects of groundwater management. Therefore she really hopes that the Commission would agree to assess and make recommendations regarding the issues addressed in HB 1353 and 1439.

David Wunsch stated that if we are going to view the Commission's role as one that is supposed to educate the legislature, then the Commission should decide how it is going to accomplish this. He explained that the Commission may want to consider developing colleague letters that outline issues and various view points of different stakeholders.

Senator Cilley stated that if the Commission members are willing to expand its duties to assess the additional issues, that it should have a brainstorming session to hash out its mission statement and duties. She explained that the Commission could consider

approaches for developing an education program and more closely linking to the legislature.

Brian Goetz explained that DES does a good job going out to municipalities and providing education and information about water issues. He explained that often, however, the timing of the education is too late and people have somewhat fixed opinions on a project that is being proposed. Brian explained that he thought it would be important to get ahead on educating the public so that they are informed about groundwater law and science before complex or controversial projects are proposed.

Senator Barnes explained that he felt that an important tool to utilize for educating the public is the Municipal Association. He suggested that DES coordinate with this organization to develop educational outreach efforts.

Mason Westfall explained that he would like DES to summarize for the next meeting what the Commission's charge is, what it has completed, and what remains to be completed. Representative Spang explained that the annual reports document what the Commission has accomplished. Sarah Pillsbury explained that given its existing work plan and the addition of an educational initiative, that the Commission will be hard pressed to complete all of its work by November of this year.

Representative Spang asked members of the Commission to vote on expanding the Commission's mission and schedule. Mason Westfall voted against extending the Commission. Mason explained that he wanted more information on the Commission's overall charge and a summary of work completed before agreeing to extend the Commission.

Representative Spang asked Brandon Kernen about empty seats on the Commission. Brandon explained that Tom Chase who represented recreational interests had moved out of state. Michelle Hamm stated that the Business and Industry Association would be appointing a replacement for Dennis Nesbitt who no longer works for Anheuser Busch.

Senator Cilley stated she wanted to discuss the future of the Commission more. She explained that there was overlap in pending legislation (SB 403 and HB 1353) pertaining to local control over groundwater withdrawal permitting. She explained that she thought it was important to allow the Senate to vote on SB 403 to obtain an understanding of the Senators' opinions on the local control over groundwater withdrawal permitting.

Michelle Hamm explained that relative to SB 402 which would require pre-August 1998 wells to obtain permits if withdrawal volumes are increased by more than 57,600 a day over historic withdrawal rates, the Business and Industry Association agrees with the Commission's subcommittee's assessment that withdrawals from wells sited prior to August 1998 are not causing problems. She explained that there is only one instance of a pre-August 1998 well causing an unmitigated adverse impact. She stated that the Business and Industry Association feels that the conflict resolution approach developed by the subcommittee would work better than requiring a new permit for pre-August 1998

wells. Sarah Pillsbury asked Michelle if the Business and Industry Association would support the conflict resolution approach. Senator Cilley stated that she should soon have an analysis from experts in international law on adequacy of the conflict resolution approach being effective in protecting New Hampshire from legal challenges under free trade agreements.

Representative Fargo explained that he would be interested in obtaining additional information and feedback associated with large groundwater withdrawal permit applications that have been processed since the amendments to the law occurred in 2006 pursuant to SB 386. He explained that changes were made to the laws pertaining to large groundwater withdrawal permitting process, and we have not had an opportunity to see if those changes were effective. Yet, he explained, we are proposing even more changes to the permitting process now. Representative Spang explained that what the changes to the law accomplished, was ensuring the public had multiple opportunities to obtain information and provide input during the large groundwater withdrawal permitting process. She explained that the legislation being proposed this year provides municipalities with direct authority for approving projects with large groundwater withdrawals. Representative Spang explained that municipalities are concerned that the state's permitting process is only technical in nature, and that value judgments and future plans of a municipalities are not being considered. She explained that some are concerned that this will result in the state approving the use of all available water resources in a manner that is different than what residents in a municipality want.

Senator Barnes stated he would like to go back to his earlier comments regarding the importance of education and outreach relative to groundwater management issues. He stated he neglected to mention that the Business and Industry Association should play a big role in the education and outreach initiative.

Representative Spang stated that if Commission members are willing, she would like to amend the bills currently pending in the legislature that propose to give local control over large groundwater withdrawal permitting to municipalities, and assign these issues to the Groundwater Commission for study. She explained that if she committed to legislators that the Commission would complete its work on this topic by the end of this year, she felt that she could gain support for this approach.

Michelle Hamm stated that she supported Representative Spang's proposal. She stated that the Commission should invite municipalities to a Commission meeting to provide comments and recommendations on the large groundwater withdrawal permitting process. Representative Spang stated that she would like to hold hearings throughout the state on the topic. She explained that hearings for pending legislation often fail to capture input from all of the stakeholders.

Representative Fargo stated that he supported Representative Spang's proposal. He suggested that in addition to the Commission studying this issue, that DES and the Commission should quickly put together a tool kit that assists municipalities in understanding their existing authorities in managing land use, growth and water use. He

explained that communities and regional groups already have authority under state law to develop water resource plans.

Sarah Pillsbury stated that relative to HB 1353, that Representative Kurk was not emphasizing a need for local control over large groundwater withdrawal approvals, but that he seemed to focus on the fact that the concept of "public benefit" was not part of the decision making criteria. Sarah explained that the both local control and public benefit should be assessed if the Commission's responsibilities are going to be expanded. Sarah suggested that perhaps the Municipal Association should work with municipalities to assess the concept of public benefit.

Jack Donohue stated that the Commission should assess to what extent municipalities are taking advantage of the large groundwater withdrawal permitting process public involvement processes as well as utilizing their authorities at the local level to make land use decisions. He stated that if municipalities are not taking advantage of their existing authorities and public participation processes, then it does not make much sense to keep looking into adding additional steps to the permitting process.

Bob Snelling explained that if there are going to be efforts such as providing more education and outreach and completing more environmental monitoring, that these efforts are going to cost money and financial resources will need to come from somewhere to address these needs.

Representative Spang asked Brandon Kernen to provide an update on the work the Commission has completed and tasks that remain ahead. Brandon explained that the Commission completed its work on Tasks 1 (Groundwater Withdrawal Permitting) and Task 2 (Clarification of Groundwater Quantity Law and Legislative Authorities), but that the membership of the Commission has changed such that he is not sure the current members of the Commission support the reports developed by the subcommittees for these two issues any longer. He explained that at some point, the Commission will need to determine how it is going to summarize its work and recommendations on issues assessed in Tasks 1 and 2 in the final report. Brandon explained that the subcommittees studying the hierarchy of water users and protecting groundwater quality to protect quantity are currently active. He also stated that the subcommittee assessing the issue of water withdrawal fees will be meeting in the future as discussion of this issue was initiated in January. He explained that the Commission has not kicked off the data needs task yet. Sarah Pillsbury explained that the more she has been thinking about it, the more she thinks the Commission should first address the data needs issue. After data needs have been addressed, then it would make sense to evaluate water withdrawal fees, because we will have a better understanding of the costs associated with data needs.

Senator Cilley asked if there is a way to have additional members of the public that are not members of the Commission to work on subcommittees studying these issues. She explained that these committees could be used to help make progress on all of the Commission's work.

Representative Spang asked Jack Donohue to provide an update on the work of the hierarchy of water users. Jack explained that the group will be meeting again soon. He explained that at this juncture they have developed two conceptual approaches to a hierarchy. One approach establishes a list of users in order of a priority. The other approach established a list of criteria and water use characteristics that should be considered if that was a water supply emergency. He explained that at this point, the subcommittee was assessing the feasibility of creating a point ranking system for determining hierarchy. Brandon Kernen explained that as part of the hierarchy subcommittee's work, DES will be working on developing an update to New Hampshire's Drought Management Plan.

The next Commission meeting was scheduled for March 3rd at 1000 AM. The Commission meeting was adjourned at 12:00 PM.

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

**MEETING MINUTES**

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**Meeting Date:** March 3, 2008

**Prepared By:** Brandon Kernen

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

**Attendance:**

<b>Name</b>	<b>Association</b>
Senator Cilley	
Representative Spang	
Representative Fargo	
Senator Barnes	
Mason Westfall	New Hampshire Association of Conservation Commissions
Brian Goetz	New Hampshire Water Works Association
Glenn Greenwood	NH Association of Planning Commissions
Michelle Hamm	Business and Industry Association
Brandon Kernen	New Hampshire Department of Environmental Services
Sarah Pillsbury	New Hampshire Department of Environmental Services
David Wunsch	Joint Board of Licensure - Professional Geologists
Jack Donohue	International Bottled Water Association

The meeting began with a discussion of the commission's meeting minutes for its February 4, 2008 meeting. Jack Donohue stated that his name needed to be added to the list of attendees. The commission unanimously approved the minutes with the amendment.

Representative Spang updated the commission on the status of pending legislation. She explained that both the House and Senate have similar bills (HB 1353 and SB 403) that propose to have the commission study approaches for giving municipalities authority to regulate groundwater withdrawals and/or to add a public benefit aspect to the criteria that is considered when approving large groundwater withdrawals. She explained that the House bill would have extended the expiration date of the commission so that it could continue its work with its current tasks while later studying the municipal authority issue. She explained that the Senate's bill proposes that the commission report on municipal authority and public benefit considerations by November of this year. Representative Spang explained that she is concerned that the Senate's version of the bill will cause the commission to stop work on all of the other issues it is undertaking. Representative Spang also explained that she felt that the discussion of municipal authority and public

benefit would need to reference the work of the commission regarding the issue of hierarchy, data needs and the HB 1609 groundwater management plan pilot study.

Brandon Kernen explained that the revised language for HB 1353 also contained provisions requiring the groundwater commission make recommendations for improvements to the state-wide groundwater level monitoring network. He explained over the last several years, some municipalities have been requesting that legislators place moratoriums on new large groundwater withdrawals or adopt legislation that otherwise further restrict the development of new large groundwater withdrawals. He explained many times these requests come from the fact that communities are concerned that they are running out of groundwater. He stated that the only way to directly address this concern is to actually collect water level data. He explained that the development of recommendations for improving the state-wide groundwater level monitoring network proposed by HB 1353 would have to be integrated with the work of commission subcommittees working on data needs and fees. Representative Spang asked Brandon what was the status of the subcommittee for fees. Brandon explained that the commission discussed the issue as a whole earlier this year and that Sarah Pillsbury would be calling a subcommittee meeting soon. He explained that Sarah felt that the fees subcommittee should work in tandem with data needs subcommittee, as it did not make sense to study a fee structure when it has not been determined what the fees are needed for.

Representative Fargo explained that DES has committed to developing a tool box that municipalities can use to make land use management decisions that are consistent with the adequacy of water supply in an area. He also explained that the authority of municipalities to develop and apply water resource master plans also has not been tested by municipalities.

Brandon Kernen explained that HB 1353 also requires that DES develop guidance for municipalities to understand how their land use planning authorities can control where land uses that require large quantities of water occur. Brandon explained that DES is committed to developing this document even if HB 1353 is not passed. Representative Fargo explained that regional planning commissions could be the entity that assists the communities in using the toolbox.

Representative Spang asked Brandon Kernen if he is aware of any state that provides authority to municipalities to issue large groundwater withdrawal permits. Brandon responded that he is not aware of any state that has established a process for communities to regulate large groundwater withdrawals. He explained that other states do include public hearings in the process such as New Hampshire. Brandon explained that some towns such as Bedford, do require developers to assess the availability of water as part of the site plan review process to ensure new land uses are compatible with existing land uses. Representative Spang explained that the Bedford approach would not address the public benefit question that the two bills want addressed. Brandon agreed, but pointed out that aspects of public benefit are considered by the towns when issuing zoning variances which almost all bottled water projects have required to date. Brandon

explained that issues pertaining to hardship to the public and public interest are part of the five criteria that must be met when considering a zoning variance request. He explained that towns use the five criteria and their master plan when considering variance request. He pointed to a bulk water project in Sharon as an example.

Glenn Greenwood explained that he supports having a regional entity involved with coordinating water management issues because water is not just a local issue. He explained he would be more comfortable talking in terms of a water authority opposed to local control. He pointed out, however, that some regional coordination efforts have failed miserably such as with regional solid waste districts.

Relative to the discussion regarding local control, David Wunsch explained that he has observed several municipal efforts to adopt aquifer protection ordinances. He has found in some instances that the motives behind some of these efforts were not as much about protecting water quality as they were local politics or competing businesses attempting to frustrate one another.

The commission moved onto the next agenda item which was assessing the work that the commission has completed to date and identifying tasks that remained to be completed. Brandon explained that the commission completed work on Issues 1 and 2 of the work plan. He explained that although work on these issues is complete, that the views of commission have changed as membership of the commission changed. He explained that the final report of the commission will need to reflect the sometimes conflicting viewpoints of the commission members. Jack Donohue provided an update on Issue 3 - Hierarchy of Groundwater Users. He explained that he hoped that work on this issue would be completed by June.

Representative Fargo stated that he is concerned that the commission has missed opportunities to share its knowledge with the legislative committees hearing bills. He explained that even if commission members had varying viewpoints, that a representative of the commission should have briefed legislative committees on work of the commission that was relevant to the bills being heard.

Sarah Pillsbury and Brandon Kernen explained that work on Issue 4 - Fees on the Commercial Consumptive Use of Groundwater and Issue 6 - Groundwater Management Data Needs would be completed in approximately six months.

Brandon Kernen explained that work on Issue 5 - Protecting Groundwater Quality to Ensure Availability is ongoing as part of the Source Water Protection Strategy Groundwater Working Group.

Sarah Pillsbury then gave an update on Land and Conservation Grant NHDES received. She explained that the Trust for Public Lands, Smart Growth Institute Administrators of Safe Drinking Water Association and the United States Environmental Protection Agency will be analyzing the various State and NHDES programs and how they interact. She

explained that they will assess what modifications can be made to improve water quality protection by changing how the programs operate or interact.

The commission then moved back to the topic of legislation and local control over groundwater withdrawals. Senator Cilley explained that SB 403 which would have provided local control authority for approving groundwater withdrawals was amended to require that a study on the issue be completed by November of this year. She explained that the local control issue was extremely important to her and Senator Barnes and that a number of municipalities have requested this legislation. She explained that she is aware that the commission is very busy and may not want to defer its work to address the local control issue by this November. She proposed that she form another group of people not necessarily on the groundwater commission to study the issue further.

Jack Donohue asked Senator Cilley what is she specifically trying to accomplish by November of this year? Senator Cilley explained that her constituents do not have a sufficiently robust role in the decision making process for large groundwater withdrawal permitting. She explained that she would like the subcommittee to conduct research on different ways communities can have a more meaningful role in the large groundwater withdrawal permitting processes.

Glenn Greenwood explained that the role of municipalities in the permitting process was already assessed by Subcommittee 1 - Groundwater Withdrawal Permitting of the commission, and if Senator Cilley is going to develop a separate group, members of the subcommittee should be included. He explained that everyone's time is limited, however and that the commission members are working on other tasks. Sarah Pillsbury explained that if there is going to be another effort to evaluate the role of municipalities in the groundwater withdrawal permitting process, that it is really important to bring in municipalities that have been through the permitting process and to hear their thoughts. She also explained that the timeline for the study should be pushed back from November to January.

Representative Spang asked Bill McCann who is on the board of directors for SaveOurGroundwater to comment on the timing and methodology for municipalities to participate in groundwater permitting decisions. Bill explained that it is important that the evaluation be completed. He explained that he understands the commission is busy with other tasks and perhaps pushing the completion date for the evaluation of the municipal role in the groundwater withdrawal permitting process back a few months would make sense. Bill stated that it would not be acceptable to towns in the area he lives if the completion date for the evaluation was pushed back to November 2009. Bill suggested that the due date for the evaluation be somewhere in between November 2008 and November 2009. Representative Fargo recommended that an advisory committee outside of the commission immediately begin assessing the issue of local control over large groundwater withdrawal permitting. He explained that there was no need to wait for legislation on this topic. He also explained that some members of the groundwater commission should be represented on this new advisory committee.

The commission then discussed the status of SB 402 which proposes to require large groundwater withdrawal permits if withdrawals from well installed prior to August 1998 increase their withdrawal amount by more than 57,600 gallons a day when compared to historic water use records. It was explained by Senator Cilley that the bill is currently on the Senate floor and has not been considered by the Senate Finance committee. Senator Cilley stated that she had international trade experts provide an opinion on SB 402 and they found the bill would afford more protection from claims being filed under international free trade agreements than the conflict resolution proposal put forth by the Issue 1 subcommittee. Michelle Hamm stated that she had concerns about the bill. The provisions in the bill exempting community water supplies and potentially making non-complying water users to cease and desist water use were major concerns. Michelle Hamm asked how exempting community water supplies made sense when commercial entities purchase water from community water systems. Brandon Kern explained that there are good arguments as to why community water supplies should or should not be exempted from the law. Brandon explained that DES already has a lot of regulatory authority over community water systems because of the Safe Drinking Water Act.

The commission meeting was adjourned at 12:00 PM.

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

**MEETING MINUTES**

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**Meeting Date:** April 14, 2008

**Prepared By:** Brandon Kernen

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

**Attendance:**

<b>Name</b>	<b>Association</b>
Senator Cilley	
Representative Spang	
Representative Fargo	
Senator Barnes	
Mason Westfall	New Hampshire Association of Conservation Commissions
Brian Goetz	New Hampshire Water Works Association
Glenn Greenwood	NH Association of Planning Commissions
Jim Griswold	NH Farm Bureau
Michelle Hamm	Business and Industry Association
Brandon Kernen	New Hampshire Department of Environmental Services
David Wunsch	Joint Board of Licensure - Professional Geologists
Jack Donohue	International Bottled Water Association
Bob Snelling	Society for the Protection of New Hampshire's Forests

The meeting began with a discussion of the commission's meeting minutes for its March 3, 2008 meeting. The commission unanimously approved the minutes.

The meeting initiated with Senator Cilley and Representative Spang updating the commission on the status of pending legislation pertaining to groundwater. They explained that HB1353 would likely be the bill used to extend the life of the commission and to expand its scope to include:

- Assessing the concept of considering "public benefit" of a proposed large groundwater withdrawal. As part the requirement to study the "public benefit" concept, the commission must identify appropriate roles for municipalities in the permitting and regulation of large groundwater withdrawals and include input from municipalities and other appropriate entities;
- Designing an appropriate statewide monitoring plan to ensure long term sustainability of groundwater resources; and

- Participating in the development and distribution of public educational materials on the municipal role in large groundwater permitting, including local and state regulations.

It was explained that SB402 which proposed to explore similar concepts may be amended to address other water issues, but would not be advanced to address groundwater issues as originally introduced.

The commission then moved on to the next agenda item and Brandon Kernen and Brian Goetz notified the commission that the Seacoast Water Use Study had been published online. Brandon Kernen provided handouts of summary maps and tables from the report as well as an internet link to the report. Commission members had a general discussion about factors that influence water use habits such as large turf areas in new housing developments and inefficient water fixtures in higher valued homes such as hot tub/bathtubs and multiple shower head fixtures.

The next agenda item, "Update on the Issue 3 Subcommittee - Hierarchy of Water Users" was discussed. Brandon Kernen explained that the subcommittee met on March 10th. He also explained that a draft document detailing three possible approaches for a hierarchy had been distributed to subcommittee members and that comments were due April 29th. Jack Donohue explained that the subcommittee had a goal of completing its work by June 1st.

Brandon Kernen provided an update the work of the Issue 5 Subcommittee "Protecting Water Quality to Protect Quantity". He reminded commission members that a broader stakeholder group was working with the New Hampshire Department of Environmental Services (NHDES) for this subcommittee. He explained that the committee has a number of issues to address and that it is focusing on the protection of private wells at this time. Brandon explained that the subcommittee met on March 19th to discuss a white paper measures that can be taken protecting private wells and ensuring water derived from these wells meets health standards. Brandon handed out a copy of detailed minutes from the March 19th meeting and a copy of the white paper.

The Commission then moved onto the next agenda item, "Exeter River Groundwater Management Study as required by HB 1609". Senator Cilley explained that HB 1609 when initially introduced to the legislature proposed to add a new requirement to the criteria for issuing a large groundwater withdrawal permit. The bill proposed to amend state law to ensure a new large groundwater withdrawal permit does not impact the availability of water to meet planned future water supply needs of a municipality or region. Senator Cilley explained that at legislative hearings, it became clear that there was uncertainty how future water needs would be determined and how this could be integrated into the large groundwater withdrawal permitting process. For this reason, the bill was amended to require NHDES to conduct a pilot study in conjunction with stakeholders in a defined geopolitical area of the Seacoast region. The study will assess current water uses and estimate future water needs.

Brandon Kernen distributed a written summary of the objectives of the project and an outline of NHDES' draft approach to work for completing the study. He also handed out PowerPoint slides that provided examples of the type of data and assessment methodologies that would be used for the project. He explained that some assumptions and generalizations would need to be made to complete the project due to the availability of data. David Wunsch mentioned a detailed bedrock mapping project the New Hampshire Geological Survey is completing in Dublin, and that this might serve as a model for other municipalities to undertake.

Under "other business" on the agenda, Representative Spang and Senator Cilley discussed the current membership of the commission. It was agreed that some inactive members should be replaced. The need to engage entities not formally represented on the Commission was also emphasized by several commission members.

The commission meeting was adjourned at 11:30 AM.

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

**MEETING MINUTES**

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**Meeting Date:** June 30, 2008

**Prepared By:** Brandon Kernen

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

**Attendance:**

<b>Name</b>	<b>Association</b>
Senator Cilley	
Representative Spang	
Representative Fargo	
Senator Barnes	
Mason Westfall	New Hampshire Association of Conservation Commissions
Glenn Greenwood	NH Association of Planning Commissions
Jim Griswold	NH Farm Bureau
Michelle Hamm	Business and Industry Association
Brandon Kernen	New Hampshire Department of Environmental Services
Sarah Pillsbury	New Hampshire Department of Environmental Services
Bob Snelling	Society for the Protection of New Hampshire's Forests
Terry Swain	Public Member

The meeting began with a discussion of the Commission's meeting minutes for its April 14, 2008 meeting. The Commission unanimously approved the minutes.

The Commission then moved to the next agenda item and received updates on the work of the Commission's subcommittees. The Commission first received an update on the work of the Issue 3 Subcommittee - Hierarchy of Water Users. Brandon Kernen explained that the subcommittee has significantly completed research on this topic and has been reviewing and commenting on narratives summarizing different ways a hierarchy could be established and applied. Brandon explained that he met with Jack Donohue (chairman of the subcommittee) the prior week and that Jack provided detailed comments. Brandon explained that within 1-2 weeks, another draft report will be developed for final comment by subcommittee members before the subcommittee brings its report to the full Commission. Jim Griswold asked if it is an option for the subcommittee to find that a water use hierarchy is not needed. Brandon explained that the work plan the Commission developed specified that it needed to assess the drought management plan to determine if the hierarchy of water users in that document is adequate. He explained that the work plan stated that if the Commission finds the hierarchy of water users is not adequate in the Drought Management Plan, that it should

recommend an approach. Brandon explained that the subcommittee found that the Drought Management Plan does not include a hierarchy of water users. He explained that the subcommittee needs to develop one for consideration. He explained that the Commission or subcommittee may determine that a hierarchy is not needed. Representative Spang described that she felt the subcommittee may develop a document that describes different ways a hierarchy of water users could be considered and applied. She explained that this could open the door on the discussion and help identify the additional information or data that would be needed to apply a hierarchy to water users in a reasonable manner. Brandon stated that Representative Spang made an excellent point about data needs. He explained that it is one thing to be idea rich about how to manage water resources and establish a hierarchy, but if we are data poor and have limited information to base resource management decisions on and are not committed to improving this, then it makes no sense to keep discussing management concepts. Brandon noted that Representative Spang had previously suggested that someone should describe the data needed and associated costs to apply a water use hierarchy. He offered to assist Representative Spang with this effort. Representative Spang explained that more than any other issue, she feels that much of the discussion about groundwater is driven by perception or gut feelings and that data collection and analyses are needed to keep us honest. She explained for example, that large groundwater withdrawal applications receive much attention from the public, but that people do not seem concerned about other projects that use large volumes of groundwater such as a large housing development that will rely on individual private wells.

Senator Barnes asked how much water is produced and consumed in New Hampshire. Brandon Kernen stated that DES can look-up and provide that information to Senator Barnes.

Representative Fargo explained that the Commission only has the ability to make recommendations on water use hierarchy approaches and that it would be up to the Governor or legislature to act upon them.

The Commission then moved onto the next agenda item and received an update on the work of the Issue 5 Subcommittee - Protecting Water Quality to Protect Water Quantity. Brandon Kernen stated that an advisory committee outside of the Commission was assisting DES with work on this topic. He explained that this subcommittee must address the following four topic areas: 1) Protection of private residential wells; 2) Land use near wells; 3) Municipal/local groundwater protection assistance; and 4) Aquifer protection/protection of future well sites. He explained that he provided the Commission with a white paper addressing the protection of private residential wells at the April Commission meeting. He explained that the advisory group generally seems supportive of requiring water quality testing of private wells for new homes and as part of real estate transactions. He noted that stakeholders representing real estate interests and some well drillers expressed some concerns. Brandon explained that DES will continue to work on this issue and other Issue 5 topics in couple of months with the advisory group. He explained that DES staff working on this initiative have other commitments that need to be addressed over the next several weeks. He also explained that some stakeholders felt

the work was proceeding too quickly without fully considering the comments of the real estate and well drilling stakeholders.

Representative Spang asked what were the concerns about requiring private well sampling. Brandon Kernen explained that the well drillers seemed open to the concept, but wanted the specifics pinned down. He explained that real estate stakeholders feel like the legislature has piled on significant requirements that make real estate transactions complicated and costly and that private well sampling would only add to this. Brandon explained that real estate stakeholders explained that due to the declining housing market that this is a particularly bad time to institute well sampling requirements. Sarah Pillsbury explained that DES was also going to contact officials in other states where private well sampling is already a requirement to understand how those programs work.

The Commission then moved onto the next agenda item, Issue 6 - Groundwater Management and Data Needs. Sarah Pillsbury noted that Bob Snelling and David Wunsch have volunteered to be co-chairs of the subcommittee. She explained that the subcommittee met once. She explained that the subcommittee has considered other parties that should be invited to work with the subcommittee. She explained that DES will be contacting these entities in the next two weeks to see if they are interested in working with the subcommittee.

Representative Spang asked if the HB 1609 Exeter River Watershed Study is shedding any light on data needs in the state. Brandon Kernen explained that the study should assist with this. Mason Westfall asked where will the funding come from to collect additional data. Sarah Pillsbury explained that the Issue 4 subcommittee - Fees on the Commercial Consumptive Use of Groundwater could assist with this.

Representative Fargo asked if DES could provide an update on the water use registration and reporting program. Michelle Hamm explained that DES recently inspected her facility (Monadnock Paper Mill). Brandon Kernen explained that Derek Bennett of DES manages the water use registration and reporting enforcement program and is methodically implementing the requirements of the statutes passed in 2005. Brandon explained that it may be many years before the program is where it needs to be in terms of compliance with the 2005 law.

The Commission then moved onto the next agenda item, "Renewal of Large Groundwater Withdrawal Rules". Brandon Kernen explained that the current rules expire next year. He explained that Steve Roy, technical manager of groundwater permitting at DES is overseeing the rule re-adoption process and would summarize proposed changes of the rules to the Commission. Steve provided two handouts to the Commission. The handouts included: 1) PowerPoint slides that summarize the proposed revisions to the rule, the rulemaking process, schedule for rule re-adoption and opportunities for public involvement with the rulemaking process; and 2) A draft of the proposed revised rules. After Steve presented this information, Representative Spang asked what would be the best way for Commission members to provide comments on significant changes to the rule. Sarah Pillsbury suggested that that after the stakeholder meeting occurs and we hear

their concerns and comments, that perhaps DES could summarize these for the Commission. Additionally, Steve explained that Commission members could provide recommendations on the materials he presented today and that Commission members could also attend the stakeholder meeting.

The Commission then moved onto the next agenda item, Land-Use Planning - Large Groundwater Withdrawal Toolkit. DES handed out a draft of the toolkit. He explained that the toolkit served two purposes. First, it is intended to proactively educate municipalities about the large groundwater withdrawal permitting process. He referenced Mason Westfall's comment at a previous Commission meeting that many communities are not aware of the state large groundwater withdrawal permitting process. He explained that the opportunity for educating may be too late after a large withdrawal is proposed and the public becomes concerned. Second, it is intended to explain to municipalities how municipalities ultimately have had definitive control over where or if large groundwater withdrawals occurred in their community. Brandon explained that at legislative hearings in the 2008 session, DES made the point that almost all new large withdrawals not associated with community water systems for new projects required significant zoning variances at the local level. This means municipalities ultimately controlled if and where large groundwater withdrawals occurred in their community. Brandon explained that legislators did not feel all towns diligently analyzed variance requests or were aware their decisions may impact large groundwater withdrawals.

Representative Spang asked Brandon Kernen what DES hoped to gain from the Commission today on this topic. Brandon Kernen explained that DES would like to get feed back now or over the next few weeks regarding the objective and content of the document. Brandon then went through the document and summarized the content of each section and appendix. The Commission then provided initial comments and recommendations regarding the document. Brandon explained that the toolkit is supposed to be a document developed by the Commission and that DES took an initial stab at developing the document to get the effort going.

Senator Cilley asked if we would test the toolkit out by having communities review it and tell the Commission what works and does not work in the document. Brandon agreed that because the document is being developed for municipalities that it would make sense to have some input from them on the document. Sarah suggested that the toolkit could be presented at planning conferences for a several year period to get this information out.

Senator Barnes asked how will DES decide who to include in reviewing drafts of this document? Brandon Kernen explained that DES would work with the Commission to determine this, but that it would make sense to get comments from communities that are most concerned about this issue.

Representative Fargo recommended that Section 2 of the document make reference to regional master plan documents that could be established under RSA 4-C:23. Representative Fargo explained that he has always wondered if the state's pre-emption of local authority to directly regulate large groundwater withdrawals would withstand

regional master plans. Representative Fargo wondered if Section 2 should be expanded to address this issue. Brandon explained that he felt statutes were very clear and that RSA 485-C:20 states that communities cannot regulate large groundwater withdrawals. Representative Fargo stated that the document should still explain the opportunity to develop regional master plans.

Glenn Greenwood stated that he has only briefly reviewed the document and wants to reserve comment at this time. He explained that his initial impression is that the document contained too much information on Supreme Court cases involving land use zoning court decisions. Glenn also cautioned that the document should not tell zoning boards in communities how they should approach variance requests. He explained that they would probably not appreciate the document explaining to them how they should approach their work. Brandon Kernen stated that he understands Glenn's point. Brandon stated that there are probably two perspectives to this. One, where people think the document is not useful without this information and the other where people think a large groundwater withdrawal permitting document is not an appropriate place to teach planning processes. Glenn stated that there are adequate resources available to educate communities about proper land use planning.

Representative Fargo stated that perhaps the document should include information about the local ordinances that certain towns have adopted to regulate large withdrawals. Brandon Kernen explained that he found it difficult to include information about these ordinances in the toolkit when two town managers have stated that the ordinances are not enforceable. Sarah suggested that perhaps language could be added in the toolkit that explains extreme caution and advice from legal experts be obtained before attempting to adopt an ordinance.

Senator Cilley cautioned that DES should not include any opinion or reference to the local large groundwater withdrawal ordinances in the toolkit. Because the ordinances have not been tested in court, she felt that we have no basis to make statements on the viability of such ordinances. She also felt that it would not help DES' public relations efforts to weigh in negatively about the ordinances. Senator Cilley explained that she understood Glenn Greenwood's position, but felt planning information needed to somehow be included in the document. She explained that communities have this belief that the state runs over their zoning efforts and approves large withdrawals that they do not support. Yet, she explained, they seem unaware of how their own land use decisions have impacted the development of large groundwater withdrawals.

Representative Spang asked Brandon Kernen to what extent OEP or planners have assisted in developing the toolkit. Brandon explained that the Commission was the first entity outside of DES to assist with the document. He explained that resources of OEP and the Local Government Center were heavily relied upon and are reshaped and presented in the toolkit. Representative Spang explained that we should bring planners and OEP into the process of developing the toolkit right away. Representative Spang explained that it seems like overtime, the meaning and applicability of various land use

tools seems to get re-interpreted. She explained that is why it is very important to get land use experts involved with developing the toolkit.

Representative Spang wondered if large groundwater withdrawals could be listed as a prohibited land use in certain zoning classifications so that variances would always have to be obtained. Glenn Greenwood stated that if this decision was not based on technical or scientific rationale that he did not think that would be proper land use planning.

Representative Spang wondered if there should be some process where a variance could only be considered after generating all of the information required for a large groundwater withdrawal permit. That way a community would have more information before making a variance decision. Representative Fargo wondered if a conditional or provisional variance could be made before the large withdrawal permit process was complete. He explained that perhaps the variance could be revisited after a decision on a large withdrawal permit application is made. Glenn Greenwood did not think this would be a workable approach. Senator Cilley explained that she once carried a bill that would have required applicants for large withdrawal permits to obtain all local approvals before initiating the large groundwater withdrawal process. She explained that she realizes now that many communities would not necessarily support this concept and based on this she would not propose that type of statutory language today. Senator Cilley explained that the idea of allowing community to issue conditional or provisional variances is interesting to her. She explained that this would be a legislative initiative that goes beyond the toolkit. Representative Spang explained that an entity would be hesitant to spend a lot of money on a state permit application if the local variance received for the project was going to be revisited.

Glenn Greenwood pointed out that the NH Supreme Court has stated that communities can attach conditions to zoning variances as they see fit. Glenn explained that he is uncomfortable with the concept he believes is being discussed whereby a variance is initially sought and obtained by an entity, but then the approval for the variance would be revisited after a large groundwater withdrawal permit is issued.

Mason Westfall stated that he does not understand why variances are being required for so many projects. He explained that regulations should be well thought out such that variances from the regulations are not frequently sought. Glenn Greenwood concurred with this suggestion and stated that obtaining variances from zoning should be pretty difficult to obtain.

Glenn Greenwood made the point that the whole concept of zoning relative to the protection of water resources needs to be changed. He explained that historically some communities implemented measures to protect water quality. He explained that he is not aware of any zoning that has considered or planned for other impacts to water such as heavy water use by golf courses or bottling plants. He explained that a community could establish groundwater protection zoning relative to groundwater availability if it invested the resources to develop a technical and scientific basis for such zoning.

Representative Fargo recommended that the toolkit contain a summary of past efforts to change how groundwater is regulated at the local level. He explained that this may include local ordinances or unsuccessful legislative initiatives. He explained that it is important to summarize these efforts, their possible shortcomings and why some legislation was not passed so that communities understand past assessments and opinions on these issues.

Representative Spang suggest that the document should explain exactly what DES can and cannot regulate relative to a project that includes a new large groundwater withdrawal.

The Commission began discussing how to move forward with the work on the toolkit. Sarah Pillsbury suggested that we pull in the expertise at OEP, Local Government Center and other regional planning commissions to assist with the toolkit. Sarah suggested that Glenn Greenwood identify other planning experts that could also assist. Sarah suggested that Commission members provide DES with comments and suggestions by the middle of July and that the Commission meet with planning experts in August. She stated that Commission members should write down all of their questions pertaining to planning and water resource protection prior to the meeting.

The Commission tentatively scheduled the next meeting for August 11th at 1000 AM. The Commission decided to address the last agenda item HB 1353(2008) at the next Commission meeting. DES handed out a draft approach for the Commission to complete the work required by HB 1353. Representative Spang and Sarah Pillsbury asked Commission members to comment on this approach by July 15th in preparation for the August 11th meeting.

The meeting was adjourned at 12:00 PM.

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

**MEETING MINUTES**

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**Meeting Date:** August 21, 2008

**Prepared By:** Brandon Kernen

The meeting began at 100 PM in Room 103 of the State House. Below is a list of participants:

**Attendance:**

<b>Name</b>	<b>Association</b>
<b>Commission Members</b>	
Senator Cilley	
Senator Barnes	
Representative Spang	
Representative Fargo	
Gary Abbott	Associated General Contractors
Jack Donohue	International Bottled Water Association
Mason Westfall	New Hampshire Association of Conservation Commissions
Jack Donohue	International Bottled Water Association
Michelle Hamm	Business and Industry Association
Brandon Kernen	New Hampshire Department of Environmental Services
Sarah Pillsbury	New Hampshire Department of Environmental Services
Bob Snelling	Society for the Protection of New Hampshire's Forests
Bill McCann	Public Member
Jim Griswold	NH Farm Bureau
Terry Swain	Public Member
David Wunsch	Joint Licensing Board
<b>Attendees that Signed In</b>	
Joel Anderson	House of Representatives - Staff
Bill Hounsell	North Conway Water Precinct/Lower Bartlett Water Precinct
Cordell Johnston	NH Municipal Association
Bill Gabler	Clean Power Development
Bruce Berke	Shaheen Phinney Capital Group
Bob Blaisdell	Demers Group
Carol Grant	Citizen - Town of Atkinson
Keith Robinson	USGS
Carl Paulson	NH Rivers Council
Greg Husevket	The Demers Group, Inc.

Ari Pollack	Gallagher, Callahan & Gartrell
Maria Reinemann	Brown, Olson and Gould
Kathy Veracco	Sheehan Phinney Capitol Group

The meeting began with a discussion of the Commission's meeting minutes for its June 30, 2008 meeting. The Commission unanimously approved the minutes.

The Commission began discussing the first item on the agenda, commission membership. Sarah Pillsbury explained that she was in communication with Kathy Goode of the Governor's office regarding open seats on the Commission. She also explained that there are some administrative housekeeping issues that need to be addressed. Sarah explained that the Governor's Office is missing paper work that officially nominated members on the Commission representing the Local Government Center, Business and Industry Association, New Hampshire Farm Bureau, New Hampshire Association of Conservation Commissions, New Hampshire Association Regional Planning Commission, and Association of General Contractors. Sarah asked that commission members representing these seats coordinate with the group they are representing to get official nomination letters to the Governor's Office. It was unclear if the paper work was never submitted or misplaced a number of years ago. Sarah also explained that Kathy Goode of the Governor's Office is aware that there are two vacant seats on the Commission. One seat represents recreational interests. Another seat represents the public. Representative Spang explained that people who have ideas or are interested in joining the Commission should contact either Kathy Goode of the Governor's Office, Senator Cilley or herself.

The Commission then moved to the next agenda item, revision of the large groundwater withdrawal rules. Brandon Kernen provided an update on the status of the rules. He explained that the rules will expire in May of 2009. He explained that the Department of Environmental Services (DES) established an informal advisory group to assist with developing an initial draft of the revised rules. Brandon explained that the group met on August 11th and that the meeting was very well attended by a broad group of stakeholders. He explained that DES established a deadline for the informal written comment period of August 29th. He explained that DES would consolidate the comments and either implement the recommendations people provide or provide written responses to the comments. He explained that this information would be shared with Commission members. Representative Spang asked Brandon how the public could obtain a draft of the revised rules. Brandon explained that the DES could e-mail a draft of the rules to people upon request.

Brandon Kernen also noted that the process for the developing the rules moving forward would depend on the type and number of comments received. He explained that there may be one more meeting among stakeholders as part of the informal rulemaking process. He also explained that once the formal rulemaking process starts that there will be at least two public hearings and opportunities to make changes to the rules at that time.

Michelle Hamm asked if the revised rules will address the regulatory requirements for developing a replacement well. Brandon Kernen explained the process for developing a

replacement well is now established in statute and that the rules will reference these requirements. He explained that the existing rules relative to replacement wells are no longer valid as they are superseded by the recently amended statute.

The Commission moved onto the next agenda item, Land Use Regulation and Large Groundwater Withdrawals ("Tool Kit" Document). Representative Spang explained that the Commission is very interested in receiving comments on the draft tool kit that provides communities with: 1) Information about the state's large groundwater withdrawal permitting process; and 2) Information about how local land use regulations affect where large groundwater withdrawals occur and the type of water use. Representative Spang explained that the Commission is interested in making improvements to the draft document and to find out if the document is useful to communities. She explained that it is the Commission's intent to have regional meetings throughout the state to discuss the content of the document.

Glenn Greenwood stated that the version of the tool kit e-mailed out to Commission members in August is a significant improvement over earlier versions. He explained that he will submit a redline version of the document that reflects his detailed comments. He explained that the ordinance section of the document should be moved right behind the master plan section of the document to make reading the document flow better. Glenn thought the section of the document describing the type of projects that require a large groundwater withdrawal permit would be helpful to communities. He felt that introducing more examples of actual projects and examples of planning throughout the document could make the document more useful for communities.

Jack Donohue asked if we knew when the Commission would have a response from the Attorney General's Office on the questions that relate to municipal authority relative to land uses associated with groundwater withdrawals. Brandon Kernen explained that we did not. He explained that a draft request for a legal opinion had been provided to Commission members for review and comment and is on the agenda to discuss at the meeting later. Sarah Pillsbury explained that it may take the Attorney General's Office some time to respond to the request for a legal opinion. She stated that the Commission could continue working on the tool kit and highlight areas of uncertainty until clarification of legal issues are obtained from the Attorney General's Office. Jack Donohue explained that much of the tool kit document is contingent on getting answers to several legal questions. Brandon agreed and explained that Section 3 of the document is largely contingent on obtaining answers to legal questions. He explained that the document cannot be completed until legal opinions are obtained, or until the law is amended to address the Commission's uncertainty about the meaning or applicability of certain laws.

Representative Spang explained that the Commission wants to complete the tool kit by the fall of 2008 before it begins its work on the other items required by HB 1353. Representative Spang asked if the tool kit could be finalized prior to getting a legal opinion. Sarah Pillsbury explained that it may be possible to do this if the document clearly identifies assumptions it makes and the uncertainties associated with the legalities

of certain aspects of the document. Glenn Greenwood felt that because the document is meant to be guidance for communities to better understand what they can and cannot regulate relative to issues associated with groundwater withdrawals, that he would be hesitant to finalize or to widely distribute the tool kit document without having definitive answers to the legal questions.

Sarah Pillsbury, Representative Spang and Glenn Greenwood had a general discussion about who the request for a legal opinion should be sent to. The Commission agreed that submitting the request to just the Attorney General's Office opposed to multiple attorneys representing multiple interests would be sufficient.

Charles Brown, the Town Administrator from Nottingham explained that the primary problem with groundwater law in New Hampshire is that towns can provide input during a large groundwater withdrawal permit application to the state, but that towns do not have authority to approve or deny large groundwater withdrawal permits.

Senator Cilley explained that the tool kit is meant to explain in clear language the various existing laws that impact how and where groundwater withdrawals are developed. She explained that ideas or proposals to change law can be considered outside the context of the tool kit, but that the tool kit is only meant to make sure the public knows the various legal mechanisms under existing law that can affect the development of large groundwater withdrawals.

Charles Brown agreed that the tool kit should focus on current law, but wanted to make sure that people were aware that many feel the law needs to be changed to provide more authority to local governments to make these decisions.

Senator Cilley explained that she understood this point. She explained that the point of the tool kit was to show municipalities that in many instances they have legal control over where large groundwater withdrawals occur.

Representative Spang asked Commission members if they had any other comments on the tool kit before she opened comments up to the public. Michelle Hamm stated that she did not think it was necessary to attach minutes of the USA Springs/Nottingham Zoning Board of Adjustment meeting to the tool kit. Brandon Kernen explained that it was attached because it was the clearest example of a zoning variance being issued without a lot of public involvement or specific consideration of the standard criteria associated with issuing zoning variances.

Susan Roman from the Town of Webster stated that she agreed with the points others made earlier at the meeting that the tool kit should not be finalized until a legal opinion from the Attorney General's Office is obtained. She explained that as she reads state law regarding local and state regulation of groundwater withdrawals, it appears to be in conflict. Susan explained that the legality of the Town of Bedford's site plan review regulations referenced in Section 2 of the tool kit could be questionable and that the responses to the request for a legal opinion from the Attorney General's Office would be

important to have before highlighting Bedford's site plan review regulations. Susan pointed out that the tool kit focuses on land use regulation but that state law has granted authority to municipalities to adopt other types of ordinances that address health, safety and general welfare concerns - often called police power ordinances. Susan asked if the Commission has ever assessed the legality of municipalities adopting local groundwater quantity ordinances separate of its land use regulation authorities. She encouraged the Commission to revise the request for legal opinion to include questions about the ability of towns to adopt water quantity ordinances under its police powers and authority to protect the welfare of the public. Brandon asked Susan to draft some language that could be added onto the request for a legal opinion that addresses the suggestions she made.

Bill Hounsell suggested that the Commission seeks clarity from the Attorney General's office about how common law, riparian rights and state law co-exist. He felt the legislature could use guidance on its authority to change how groundwater withdrawals are regulated. He felt the legislature needed this information so that it could pass laws that enable municipalities to protect their water resources without likely being subject to costly court proceedings on a case by case basis. Bill suggested that the Commission also seek a legal opinion from the United States Department of Justice.

Kimon Koulet explained that the document is a good start. Kimon explained that he agreed with Glenn Greenwood's point earlier that the tool kit should not be finalized or circulated until some of the legal uncertainties are resolved by getting a legal opinion from the Attorney General's Office. Kimon explained that some of the information in the draft tool kit needs to be clarified or corrected. He noted that in one section of the document, "regional master plans" allowed by state law are described. He explained that the reference in state law is really "regional water resource protection and management plans." He questioned if a regional zoning ordinance could be established in accordance with RSA 53A as stated in the tool kit. He noted that he is not aware of RSA 53A being used for regional ordinances, but is aware that it is used for agreements among municipalities. He suggested that the last paragraph on page 7 be clarified to explain why large withdrawals associated with geothermal processes might be exempt from large groundwater withdrawal permitting. Kimon also suggested that under land use zoning, that village districts be added to the type of districts that may be established. He also suggested that the document provide a definition for the term "water availability zoning." Kimon suggested that the statement in bold on page 18 of the document be reworded or appropriately qualified to be limited to New Hampshire in order to be accurate. Kimon recommended that the tool kit include a discussion about RSA 36:54 - Reviews of Developments of Regional Impacts whereby communities can formally provide information to other jurisdictions about regional impacts associated with proposed projects.

Maureen Westrick explained that the document will begin to show communities that there are some tools that can assist with protecting their water resources. She suggested that New Hampshire consider taking the step to acknowledge that water is a state or national treasure and begin taking steps to protect it as such. She explained that as a state, we should take measures to stop having water sold as a commodity. Senator Cilley

stated that in 2006, state law was amended to define that water is in the public trust. Senator Cilley also explained that legislation she sponsored several years ago requires that DES complete a pilot groundwater management plan for a geographical area in the Seacoast Region of the state. She explained that the project required that DES look out over a ten year period and estimate all groundwater use needs to determine if there will be a sufficient supply of water. Senator Cilley also explained that a subcommittee of the Commission is studying the concept of developing a hierarchy of water users for the state and that the subcommittee is currently reviewing a draft of the report. Mason Westfall explained that he believes we should be look out hundreds of years on what needs to be done to protect water. He explained that our existing regulations and laws are very good to protect us today, but that we need to consider what needs to be done to protect our water over the very long term.

Bill Hounsell recalled at the previous Groundwater Commission meeting that it was decided that the Commission would have regional meetings to get feedback on the tool kit and its work relating to HB 1353. He requested that one of the meetings be conducted in Conway or the Mount Washington Valley area. He explained that the regional has been very active in the regional management of water resources. Bill also explained that the whole issue of water rights was assessed in the 1980s and early 1990s. He explained that the Commission should review the work back then so it is not repeating itself. He expressed his opinion that the State should play a key role in promoting conservation and providing data about water resources, but that local government entities should ultimately make decisions about how water resources are used.

Michelle Hamm asked why the tool kit only addresses how zoning affects commercial projects that may develop large groundwater withdrawals. She explained that 75% of the large withdrawals in New Hampshire are associated with municipal water system. She stated that it seems like the tool kit should address municipal withdrawals. Representative Fargo explained that municipal water systems often connect large users to their system without any formal regulatory review. Brandon Kernen explained that the development of the tool kit was the result of many legislative proposals to increase the permitting requirements for large commercial groundwater withdrawals. He explained that there has not been much interest at the legislature for increasing the permitting requirements for municipalities to develop drinking water supplies. He explained that the document can be expanded to include large groundwater withdrawals for municipal systems if that is the consensus of the members of the Commission. Representative Spang asked if municipalities are exempt from their own land use zoning. Glenn Greenwood explained that they can be if they want to. Glenn explained that the issue of treating all water users the same or splitting commercial and municipal water users has been a reoccurring discussion that Commission members have not agreed upon. He explained that in his view, they should not be treated the same with the exception of municipal systems that enter into long-term contracts to provide extreme quantities of water to commercial businesses. He explained that municipal water systems are providing a service for the greater good of the public and that their activities have not caused disharmony and concerns in municipalities. Mason Westfall agreed with Michelle Hamm that municipal and private water users should be treated in the same manner.

Representative Spang noted that the tool kit states that you can not discriminate among water users.

Senator Cilley explained that she seemed to recall that municipal water systems have sources of water that are permitted to extract a certain amount. She explained that she understood that they could add different types of water users to the system as long as they had a sufficient capacity of water. She explained that a municipal water system could reduce the volume of water it sells to commercial users at any time if it needed water for residential connections. Sarah Pillsbury explained that public water systems serve a large societal function. Generally, water resource needs planning is completed on 10-25 year planning horizons for public water system and they are highly regulated by the State. She explained that public water systems developing new sources of water also need to meet the same regulatory requirements as commercial water users developing new water sources. Sarah explained that that it seemed like the process for managing withdrawals associated with public water systems is working well and the Commission should consider this very carefully before changing it.

Representative Spang asked attendees at the meeting if they had any suggestions about how to disseminate the tool kit when it is complete. Cordell Johnston explained that the tool kit could probably be posted on the website of the Local Government Center. Cordell explained that the Local Government Center also has e-mail and address information for various contacts for municipalities. He also explained that they have a newsletter that is published ten times a year.

Cynthia Copeland of the Strafford Regional Planning Commission explained that she filled the role as a town planner for Nottingham during the USA Springs large groundwater withdrawal permitting process. She also explained that other large groundwater withdrawals were developed in towns that are members of the Strafford Regional Planning Commission. These included municipal wells in the City of Rochester and wells for a golf course in New Durham. Cynthia explained that with the USA Springs project, the Strafford Regional Planning Commission sponsored an education event for the public and municipalities to learn about the science of hydrogeology, water law, groundwater contamination and aquifer tests. She explained that the education event had 150-200 people in attendance and was very well received. Cynthia explained that the public interest in proposed groundwater withdrawals seemed to be tied to the type of withdrawals that were being developed. She explained that there was very little public interest in the large groundwater withdrawal for the golf course. She explained that there was no interest in the large groundwater withdrawal submitted by the City of Rochester.

Representative Spang asked if regional planning commissions are encouraging the development of water resource chapters in their master plans. Julie LaBranche explained that master plans the Strafford Regional Planning Commission has been working on include water resource plans. She explained that they are completing work on master plans for the City of Rochester and Newmarket currently. Mason Westfall asked who should the tool kit be sent to in communities. Charles Brown stated that for Nottingham, Northwood and Barrington, that the Town Administrators know which individuals will

are interested and need the information. After further discussion, Mason and Charles agreed that Planning Boards and Conservation Commissions would be two key governmental bodies to get this information to. Representative Spang suggested that perhaps the tool kit will help show communities the value of having a water resources chapter in their master plan. Charles Brown explained that unfortunately, people are not too interested in these kind of initiatives until such time there is a proposed project or problem in their town. He explained that this often means people have an interest "after the fact," when it is too late.

Senator Cilley stated that Bill McCann and Cynthia Copeland seemed to suggest that the Commission should have public meetings around the state to discuss the tool kit. She asked if it was their intention to have the tool kit further vetted by interested stakeholders or if the Commission would be presenting the tool kit as an educational tool to the public at these meetings. Bill Hounsell explained that he believes the public meetings should be for educational purposes. He explained how in northern New Hampshire, many of the water systems or municipalities rely on subgovernments such as village districts to run the water system and/or localized areas of towns. He explained that the subgovernments often control land use zoning or have zoning requirements that are a little stricter than the municipalities. Bill stated that the subgovernments are very sophisticated and would probably readily apply the information they learn from the tool kit. Senator Cilley asked Cynthia if she agreed the public meetings should be educational events. Cynthia stated that she did, and that potentially arrangements could be made to get cable access channels to cover these events. Senator Cilley asked Commission members and the public attending the meeting if they were aware of any available funding to cover the cost of Commission members traveling to a few regional locations in the state to conduct workshops or educational events. Cynthia Copeland and Bill Hounsell offered to assist with logistics and organizing the public education events. Nobody at the meeting identified any funding sources.

Sarah Pillsbury stated that there are a number of existing venues where people that are interested in planning or environmental issues go to discuss and learn more about these issues. Sarah explained that it would be important to take full advantage of these venues. Sarah explained that municipalities have expressed frustration about state agencies bringing forward various new planning or environmental issues in a single item/piece meal fashion. She explained that based on the work recently completed by the Trust for Public Lands which assessed how DES environmental protection programs could be more effective or efficient, the public would rather have new environmental and planning initiatives addressed in the context of a municipality's overall planning and environmental protection goals and objectives. Sarah also explained that the DES will be going the around the state in the fall to present the Water Primer for the State of New Hampshire and the results of the stakeholder's survey on water issues for the state. She explained that the water primer will encompass much more than just groundwater, but that the ideas and recommendations in the tool kit could be described when discussing the chapter in the primer on groundwater.

Representative Spang stated that the Commission would now transition from the discussion on the tool kit to the 5th item on the agenda "Draft approach to work required by HB 1353". She explained that HB 1353 extended the work of the Groundwater Commission to November 2010. She explained that HB 1353 requires the Commission, by November 2009, study criteria, including public benefit, for granting of large groundwater withdrawals. HB 1353 requires that consideration of this issue include appropriate roles for municipalities in the permitting and regulation large groundwater withdrawals and include input from municipalities and other appropriate entities.

Representative Spang asked Cynthia Copeland to share her ideas about how the role of municipalities could be improved in the permitting process. Cynthia expressed that she felt there were three points that needed to be addressed by regulators with large projects that may have regional impacts. These points included: 1) Interconnecting the various local and state permits associated with the project; 2) Ensuring there is a process to address concerns of neighboring communities; and 3) Involving and educating the public about the project. Cynthia explained that prior to working in New Hampshire, she worked on various environmental projects in Texas. She explained that in Texas, various regulatory aspects on a given project are not approved or disapproved individually, but rather all of the issues associated with a project are reviewed collectively and that connectivity among the various permit applications is essential. She explained that in Texas, permitting of environmental issues is delegated from the state to the counties. She stated that this is different than how it is in New Hampshire where the state has authority to regulate certain aspects of a project and municipalities have authority to regulate other aspects of a project. Cynthia described how she was acting as the role of the Town planner for Nottingham during the USA Springs large groundwater withdrawal permit application. She explained that because the state and town each had authority to regulate different aspects of the project, that she was trying to coordinate between the two parties to ensure that there was connectivity between decisions the town was making and decisions DES was making. Senator Cilley noted that a new law she sponsored a couple of years ago now requires that copies all correspondence from the applicant or DES be copied to all municipalities that are stakeholders associated with a proposed new large groundwater withdrawal.

Cynthia Copeland explained that eleven communities were identified as stakeholders because the USA Springs project was considered a development of regional impact. She explained that she was looking for other models of how New England States have handled disjointed permitting processes that are divided among regulatory agencies at the state and local levels. Cynthia explained that she identified two different two District of Critical Planning Concern models that are used by the Cape Cod Commission. The first model is in a watershed where there is critical water supply concerns. Cynthia explained that she believes that several communities in the seacoast region of New Hampshire would view themselves as being in a region where water supply issues are critical. The other example Cynthia provided the Commission was the Cape Cod Commission's governing regulations for developments of regional impact. Cynthia explained that it is her opinion that these examples from the Cape Cod Commission are good approaches for

having one umbrella permit that all of the other permits fall under in an interconnective manner.

Mason Westfall asked Cynthia Copeland how does one community go about involving other communities that may be impacted by a proposed project. Cynthia explained that in the case of USA Springs and Nottingham, the planning board declared that the USA Springs bottled water project was a project of regional impact and therefore the other communities were noticed.

Charles Brown explained that one concern for citizens that form grass-root organizations in response to proposed projects, is the issue of legal standing. He explained that some of the citizen organizations were not recognized by the Water Council or Wetland Council as having legal standing when these groups attempted to appeal decisions made by DES. Bill McCann agreed with Charles' point about standing and explained that in his experience groups such as SaveOurGroundwater or the Neighborhood Guardians in Nottingham are not being recognized as having standing when they appeal various state permits. He explained that these groups are usually made up of residents that live near by the project and could be affected by the project and that if the State truly wants the large groundwater withdrawal process to be a process that involves public input, these groups should have standing. Senator Cilley stated that she agrees with Bill's point. She explained that when the legislature amended state law to make it clear that communities had standing to appeal decisions of DES for projects that impacted them, the legislative committees had a hard time agreeing where to draw the line on who can appeal a decision. She explained that no one agreed that state law should allow appeals from just anyone who wanted to appeal. Senator Cilley explained that she hoped that towns were being responsive to concerns of its residents and taking these forward in appeal processes when appropriate.

The Commission and audience did not have a chance to discuss the approach to work for HB 1353 in detail (agenda item 5).

The Commission also did not have a chance to discuss the sixth agenda item in detail "Draft request for legal opinions on various issues pertaining to groundwater withdrawals". Instead, the Commission decided that the Commission members and other people in attendance at the meeting should review the draft request for a legal opinion handed out at the meeting and e-mail detailed written comments to Brandon Kernen within a week or two.

Senator Barnes and Cilley agreed that the Commission should consider conducting regional meetings to discuss the tool kit and Senator Cilley recommended that a subcommittee be formed to organize the logistics and to attend these meetings. Senator Cilley explained that there are some issues with the Right-to-Know Act that need to be worked out relative to if a quorum is required at meetings of a subcommittee or when meetings are being conducted but no decisions are being made.

Kimon Koulet explained that he is interested in learning if other states charge severance fees for consumptive uses of water. Senator Cilley explained the Commission has researched what other states have charged for water use and that this information could be provided to him. He explained he is specifically interested in learning if other states have charged fees for water use and returned the revenue back to the local communities. Sarah Pillsbury noted that Rhode Island has a water use fee model that returns some money to municipalities. Brandon Kernen committed to sending Kimon information on the topic.

Carol Grant stated that the request for the opinion from the Attorney General's Office should include a question about a municipality's authority to regulate groundwater withdrawals by citing its police power under RSA 41:8.

Maureen Westrick explained that she believes there needs to be much more scrutiny regarding how international trade law could threaten our ability to safeguard our water resources. Senator Cilley explained that all of the broad issues of concern associated with international are being studied by a Senate Bill 162 Citizens Trade Policy commission.

The meeting adjourned at approximately 3:20 PM.

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

**MEETING MINUTES**

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**Meeting Date:** October 1, 2008

**Prepared By:** Brandon Kernen

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

**Attendance:**

<b>Name</b>	<b>Association</b>
<b>Commission Members</b>	
Senator Cilley	
Senator Barnes	
Representative Spang	
Representative Fargo	
Gary Abbott	Associated General Contractors
Jack Donohue	International Bottled Water Association
Mason Westfall	New Hampshire Association of Conservation Commissions
Jack Donohue	International Bottled Water Association
Michelle Hamm	Business and Industry Association
Brandon Kernen	New Hampshire Department of Environmental Services
Sarah Pillsbury	New Hampshire Department of Environmental Services
Bob Snelling	Society for the Protection of New Hampshire's Forests
Bill McCann	Public Member
Jim Griswold	NH Farm Bureau
Terry Swain	Public Member
David Wunsch	Joint Licensing Board
<b>Attendees that Signed In</b>	
Dari Sassan	NH Office of Energy and Planning
Peg Foss	Citizen - Town of Webster
Joel Anderson	House of Representatives - Staff
Bill Hounsell	North Conway Water Precinct/Lower Bartlett Water Precinct
Cordell Johnston	NH Municipal Association
Bill Gabler	Clean Power Development
Bruce Berke	Shaheen Phinney Capital Group
Bob Blaisdell	Demers Group
Carol Grant	Citizen - Town of Atkinson
Keith Robinson	USGS

Carl Paulson	NH Rivers Council
Greg Husevket	The Demers Group, Inc.
Ari Pollack	Gallagher, Callahan & Gartrell
Maria Reinemann	Brown, Olson and Gould
Kathy Veracco	Sheehan Phinney Capitol Group

The meeting began with a discussion of the Commission's meeting minutes for its August 21, 2008 meeting. The Commission unanimously approved the minutes with a provision that Carol Grant be added to the list of attendees at the August 21st meeting .

The Commission then moved onto the first agenda item, "Request for Legal Opinions Pertaining to Local Authority to Regulate Groundwater Withdrawals - Discussion with Attorney General's Office." Richard Head of the Department of Justice attended a meeting to discuss the Commission's request for a legal opinion dated September 15, 2008. Below is a summary of Richard's discussion regarding four issues identified in the legal opinion request. A copy of the legal opinion request was distributed to Commission members prior to the meeting.

***Issue 1) Under existing state law, can municipalities regulate groundwater withdrawals that are less than 57,600 gallons over any 24-hour period?***

*State law (RSA 485-C-21) requires the Department of Environmental Services (DES) to regulate new groundwater withdrawals that exceed 57,600 gallons/24-hour period to ensure that adverse impacts to water users and water resources do not occur. State law does not stipulate that DES has authority to proactively assess the impacts or has the authority to approve or deny new groundwater withdrawals that are less than 57,600/24-hour period.*

*The Commission would like to know if municipalities have the authority to specifically regulate groundwater withdrawals that are less than 57,600 gallons/24-hour period through zoning or regulations. We specifically would like assistance in interpreting the meaning of RSA 485-C:20 which states "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."*

*Does RSA 485-C:20 mean that communities are:*

- 1) Preempted from specifically regulating any and all groundwater withdrawals, including those less than 57,600 gallons/24-hour period via the use of zoning or any other regulations or ordinances; or*
- 2) Allowed to regulate groundwater withdrawals less than 57,600 gallons/24-hour period because nothing in RSA 485-C enables DES to have authority to regulate these withdrawals, and therefore such local measures would not be in conflict with RSA 485-C:20. This question is posed under the assumption that a municipality utilizes appropriate enabling statutory authority for adopting regulations or zoning ordinances. It is also assumed that and regulation or zoning is based on scientific data and applied in a nondiscriminatory manner?*

*The Commission notes that state law provides municipalities broad authority to protect natural resources, ensure proper use of natural resources, and to ensure the welfare of the general public is protected under subdivision regulations, site plan review regulations, and zoning ordinances. If it is determined that RSA 485-C:20 does not preempt municipalities from adopting this type of regulation, would the statutes applicable to health ordinances, site plan review regulations, subdivision regulations and zoning provide the adequate authority for municipalities to adopt requirements for groundwater withdrawals less than 57,600 gallons/24-hour period?*

*Municipalities, through planning and land use regulation can affect the type of land use development that may occur. This in turn may affect where groundwater withdrawals of any extraction volume may occur. The questions posed above do not seek clarification of these authorities.*

**Summary Response:** RSA 485-C:20 expressly preempts municipalities from regulating groundwater withdrawals that exceed 57,600 gallons over any 24-hour period. It is less clear whether RSA 485-C:20 preempts municipalities from regulating groundwater withdrawals that are less than 57,600 gallons over any 24-hour period. This area of the statute could be clarified to ensure the intent of the law is clear.

Any municipal regulation is not legal if it is not consistent with the Public Trust Doctrine.

**Detailed Response:** Richard Head explained that this is ultimately an issue of preemption. He explained that the question really is does RSA 485-C:20 preempt municipality from enacting any ordinance or legislation that deals with groundwater withdrawals. He explained that with the preemption concept, you may have expressed or implied preemption. You cannot legally establish a local ordinance that explicitly contradicts state statute.

Richard explained that he feels it can be confidently concluded that there is express preemption in RSA 485-C:20 for new large groundwater withdrawals that exceed 57,600 gallons over any 24 hour period. Richard explained that this does not really address the question about if municipalities can regulate groundwater withdrawals that are less than 57,600 gallons over any 24-hour period. He explained that the answer to this question has less certainty. He explained that part of the reason for the uncertainty is that it is much easier to answer a question when you have a the specific provisions of a municipal ordinance to evaluate. He explained that there may be some ordinances that affect withdrawals below 57,600 gallons over any 24-hour period that do not in anyway conflict with state statute. He explained that the answer may depend on what the legislature intended by the language “*other than groundwater withdrawals*” contained in RSA 485-C:20. Richard explained that if you look at the legislative history of RSA 485-C:20, it was brought into statute by the legislature along only with the requirements for new groundwater withdrawals that exceed 57,600 gallons over any 24-hour period. Richard explained that based on this fact, a good argument could be made that express preemption only applied to groundwater withdrawals exceeding 57,600 gallons over any 24-hour period. On the other hand, he explained, the statute 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 (emphasis added)*”. He explained that this provision does not say “other than groundwater withdrawals exceeding 57,600 gallons over any 24-hour period” so there is ambiguity there. Richard also explained that RSA 485-C addresses many things pertaining to groundwater and just not large groundwater withdrawals, so an

argument could be made that RSA 485-C:20 is not just tied to large groundwater withdrawals but all groundwater withdrawals.

He said that this brings you to what was the intent of the legislation. Richard explained that he reviewed the legislative history of SB 374 in 1998 (the year the large groundwater withdrawal requirements were put into RSA 485-C) and there was not a great deal of conversation regarding RSA 485-C:20 in the legislative record. He explained that majority of the record of the legislative history focused on RSA 485-C:21 which established the parameters of the large withdrawal permitting process. Therefore, the record documenting the legislative history for RSA 485-C:20 is not that helpful in explaining the legislative intent. Richard explained that with a lack of a record reflecting the legislative history and intent of RSA 485-C:20, the meaning of RSA 485-C:20 comes down to the ordinary reading of the language. He explained that because language in RSA 485-C:20 is too ambiguous to definitively state that municipalities are or are not preempted from regulating groundwater withdrawals less than 57,600 gallons over any 24-hour period, he cannot give a definitive answer to the question above. He explained that because there is uncertainty with the meaning of RSA 485-C:20, it comes down to what does the Commission or legislature want RSA 285-C:20 to mean. He explained that at the end of the day, the legislature does have control over whether there is preemption over groundwater withdrawals. Richard stated that this is an area that could use clarification in state law.

Senator Barnes has Richard if he would like the legislature to develop legislation address the ambiguities in RSA 485-C:20. Richard explained that he had no opinion on that – that this is a policy decision for the legislature. Richard explained that the Department of Justice generally does not enter into policy discussions on these type of issues. He explained that the Department of Justice may assist DES if there was a question of law that needed to be addressed under existing statute as it pertains to a certain project or permit and the Department of Justice may take a position on what existing statute means. The Department of Justice would not likely enter a public policy discussion on what the requirements of proposed statutes should mean.

Robert Snelling asked that because people have a common law right to access and use groundwater from land they own and the state holds groundwater in the public trust, would not the regulation of groundwater by a municipality undermine the State/public trust-private land owner/common law rights balance for controlling how groundwater can be used? Richard explained that the premise of Robert's question may not be accurate. Richard explained that although there is statutory language in RSA 481.1 and RSA 485-C that identifies groundwater as being part of the public trust, the legislature does not define the public trust doctrine. He explained that the statutes that state groundwater is part of the public trust only represents the legislature's desire that it be considered as part of the public trust and it does not, by itself, mean that it actually is. Richard explained that common law determines what a public trust is and that the legislature does not have authority to change this. Richard stated that the New Hampshire Supreme Court has not made a specific finding on whether or not groundwater is considered as part of the public trust. He noted that the court has cited statutes stating that groundwater is part of the public trust, but that this is different than actually declaring that it is part of the public trust. The Department of Justice has taken the position in the past that groundwater is governed by the public trust doctrine. Robert asked that if we just assume groundwater is part of the public trust, would it then be legally possible for municipalities to regulate groundwater. Richard explained that it would be, as long as the municipal regulations were consistent with protecting the public trust and were not contrary to state statutes.

Senator Cilley asked Richard if by using their authorities under RSA 485-C to protect water quality, would this not give municipalities the ability to indirectly regulate water quantity/withdrawals? Richard explained that under the existing statute, a municipality could not make its water quality protection provisions so inclusive such that you are regulating water withdrawals.

Representative Spang explained that in 2006, Senator Green sponsored SB 386 which ultimately amended RSA 485-C to make it clear to the courts that groundwater is part of the public trust. Richard explained that the provisions of SB 386 certainly made it clear that it is the Legislature's opinion that groundwater is part of the public trust, but at the end of day it is not a legal determination made by the legislature. The public trust doctrine is based on common law understanding that dates back to the English King and has evolved and been interpreted by courts over time. Richard explained that the legislature's opinion could influence future interpretations of the public trust doctrine, but cannot define it directly.

Richard explained that the statutes enacted by the Legislature and common law often work together in tandem. He explained that it is impossible for statutory law to anticipate every condition or question that may arise for a certain issue that the legislature intended to regulate. He explained that common law fills the gaps when determining how to address these questions or conditions. To the extent that the gaps in statute are identified and are then addressed by common law, the legislature can amend a statute to remove those gaps in lieu of relying on common law.

Richard also made the point that if a municipality developed very restrictive regulations to regulate groundwater withdrawals less than 57,600 gallons over any 24-hour period, then that may drive people to develop withdrawals that exceed 57,600 gallons over any 24-hour period which RSA 485-C:20 clearly preempts municipalities from regulating.

**Issue 2: Under existing land use zoning statutes, can a municipality develop and implement zoning based on scientifically and technically defensible data to restrict the type or magnitude of new groundwater withdrawals that occur in a given area? If so, would grandfathering existing land and water uses from new zoning requirements violate a property owner's common law right to reasonably use groundwater for new land uses because grandfathered land uses would have a less restrictions on water use than new land uses?**

*RSA 485-C:21 establishes a process and criteria for when the DES must approve or deny permission for an entity in extract more than 57,600 gallons over any 24-hour period from well(s) sited after July 1998. RSA 485-C:20 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".*

*The Commission notes that RSA 485-C only stipulates a permitting process that an applicant for each new proposed large groundwater withdrawal must complete. No language contained in RSA 485-C addresses land use planning relative to water supply/quantity or provides the state with authority to implement zoning that ensures that an adequate supply of water is maintained in a given area. Does this mean that a municipality following the proper master planning and land use zoning procedures could control the type and magnitude of new groundwater withdrawals that are developed in a given zone within a municipality? For example, some towns in the*

*southern part of the state have localized areas within their borders where wells routinely become dewatered. This is because of the nature of the geology, excessive residential lawn watering and high density of private wells or small community water systems in the localized area of the municipality. In these localized areas, it may be appropriate to ensure future land development controls the type of new water uses (consumptive versus non consumptive) and magnitude of new water uses. Similarly, if a municipality collected data that determined the sustainability of an aquifer in a municipality will be exceeded in the future, it may be desirable to apply water supply zoning to the area that limits the density of development, magnitude of water use and the type of water use.*

*The Commission notes that municipalities may develop a local water resources and management and protection plan and as part of its master plan pursuant to RSA 4-C:22 and RSA 674. RSA 674, II also enables municipalities to adopt innovative land use controls that allow the implementation of zoning to protect groundwater. Additionally, municipalities can work together to develop regional water resource plans pursuant to RSA 4-C:23 and implement regional zoning consistent with the regional water resource plan in using the inter-municipal agreement provisions set forth in RSA 53-A.*

**Summary Response:** The preemption questions that are addressed in question 1, above are relevant to this question. Additionally, the more restrictive a local regulation or ordinance becomes, the more likely land owners will make claims that their property can no longer be viably used or that a property owner's common law right to reasonably use groundwater is being violated.

**Detailed Response:** Richard explained that a few questions came to mind as he considered this question. First, he asked who has jurisdiction to regulate the reasonable use of groundwater absent any local or state regulations. He explained that no matter what regulations exist, a property owner is limited to only a reasonable use of the groundwater beneath their land under common law. For example, Richard explained that he could probably not use groundwater excessively and end up draining or drying his neighbor's well. Richard explained that this would probably be considered an unreasonable use. In this case, an impacted neighbor has the right to go into court to make the neighbor stop the unreasonable use. The next question is, Richard explained, does any other entity not directly impacted by the unreasonable water use have a right to take the unreasonable water user to court? Richard explained that absent of any state law or municipal regulation, that the answer to this question is probably not.

Richard explained that this question adds another layer to this scenario relative to how local jurisdiction could affect the hypothetical scenario described above. If a municipality were to adopt a regulation or ordinance (that is not preempted by any state law - refer back to answer to question 1) to control the way the groundwater is used, a municipality would have the right to go to court if it felt a groundwater use was unreasonable. The next question would be is it true that a groundwater use is unreasonable? Richard explained that because question 2 is premised on any town regulation being grounded in sound science and applied in a non discriminatory manner, that he'll assume that the municipality can make the case that the water use is in fact unreasonable. Richard explained that if we continue to assume that there is no state law that addresses this type of unreasonable use, then the state could not take legal action unless it took the position that groundwater is in the public trust and the unreasonable user was violating public trust. If the state took this position, the Department of Justice could take legal action to protect the public trust.

Brandon Kernen explained that Richard's answer addresses a hypothetical scenario where a municipality has adopted a regulation to respond to problems relative to groundwater. Brandon asked if a town conducted a study and identified an area of town as having a low quantity of water and that existing wells routinely became dewatered, could a town develop zoning that limits the type of water use (consumptive versus non-consumptive) or amount of water use for new land uses? Brandon asked if the answer to the question is "yes," then would not there be a common law problem because property owners with new uses of groundwater would be more restricted than existing property owners that predate the ordinance. Richard explained that there are two issues. He explained that under common law, there is this constant that you have a right to reasonable use of groundwater on your property. If you say that that a certain area in a municipality is a low volume area so you are not going to allow withdrawals from this area then you are starting to get into the problem of can that property be viably used - is there an alternative water supply or is there some other way to use the property? Richard explained that the Supreme Court in the USA Springs Decision stated the following:

*"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."*

Richard explained that what the Supreme Court is stating is that by simply regulating groundwater, you are not condemning that property. He explained that you may be creating legal problems if you render that property useless for certain purposes as you may be getting into Constitutional Protections. However, he explained that if you are only limiting some of the use of the groundwater at the property, that would be a fact that is considered in a legal proceeding. Richard explained that the more restrictive a given regulation is relative to groundwater use, the more likely property owners will claim their property has been rendered useless. Richard explained that evaluation of these types of complaints would be fact specific and it is really not possible to give generalized answers to the question.

Representative Spang explained that there are ways to get around rendering land useless if groundwater use at a property is restricted due to regulation. She explained that some properties may be able to get water from a municipal water supply or an adjacent property. Could it be determined that the use of a property was rendered useless because the use of groundwater onsite, which is the cheapest and best source is not available, but an alternative source that costs more and may not be as desirable for other reasons is available? Richard explained that the answer to this question is very fact specific and he is reluctant to give legal opinions on multiple hypothetical scenarios that could fall under this question. He explained that it is important to recognize that these are questions that may be raised as municipalities develop groundwater withdrawal regulations.

Peg Foss asked if because the state statute does not allow DES to regulate groundwater withdrawals unless they exceed 57,600 gallons over any 24-hour period, could not an argument be made that the State has no interest in groundwater withdrawals less than 57,600 gallons over any 24-hour period? Richard explained that this relates back to the answer to the first question. That any new withdrawal that exceeds 57,600 gallons over any 24-hour period is expressly preempted in statute from regulation by a municipality. He explained that if a new withdrawal is less than 57,600 gallons over any 24-hour period, then as he explained in his answer to question 1, it is ambiguous if a municipality is preempted. In addition, the public trust discussion above would also apply.

Peg Foss asked Richard if a given water use is being transported off a property or out of a municipality, how does this impact consideration of reasonable use? Richard explained that there is an older court decision out there that found that exporting water itself does not violate reasonable use of groundwater. He explained that this made sense because the fact you export water does not mean you are adversely impacting another water user's ability to reasonable use groundwater. He explained that there could be a scenario where a property straddles two municipalities. Under this scenario, a well and the dwelling it supplies could be in two different towns. Exporting the water from the well on one side of the property to the dwelling on the other side of the property would not affect reasonable use.

Senator Cilley asked what if a proposed water use will not impact any other water users now, but based on a master plan of a municipality, it appears it will impact other water users in the future. Richard explained that the a given water use at a certain property may be reasonable at one point and time and then later be considered unreasonable if it interferes with other property owners ability to use groundwater beneath their land in the future.

### **Issue 3: Municipal Authority to Regulate Groundwater Withdrawals Based on Citizen Voting**

*Over the past year, two legislative initiatives were proposed that would have provided municipalities with the authority to conduct a citizen referendum to determine if certain types of new commercial groundwater withdrawals were permissible. These initiatives did not pass. However, HB 1353 requires that Groundwater Commission assess this concept. The Commission notes on one hand that land use decisions and groundwater withdrawal regulation must be grounded in sound science and land use planning and be applied in a nondiscriminatory manner. Land use planning and groundwater regulation must also recognize environmental protection and the rights of property owners. Therefore a referendum of this nature seems potentially problematic. However, it is noted that RSA 47:27 and 31:109 allows for formal decisions on siting oil refineries to be based on referendum voting by citizens in a municipality.*

*We request that your office provide insight on the legal viability of using citizen referendums to make decisions regarding the approval or denial of specific groundwater withdrawal projects. Would it make a difference if the referendum is done after a groundwater withdrawal application is administratively complete so that citizens could base their vote on technical data?*

Richard explained that the legislature could enact a law that gave municipalities authority to conduct referendum voting on large groundwater withdrawal projects. Richard explained that the current law (RSA 485-C:20) that pre-empts municipalities from regulating withdrawals that exceed 57,600 gallons over any 24-hour period would have to be changed to allow referendum voting.

Brandon Kernen asked Richard what would happen if scientific data showed that the groundwater withdrawal would not impact other water users or resources, but was still denied due to the outcome of a citizen's referendum? Brandon asked if this wouldn't be challenged under common law? Richard stated that a challenge under common law is likely to occur if this scenario occurred. Richard explained that he would not predict the outcome of such a legal challenge because the facts relating to a challenge of this nature would be very case specific.

**Issue 4: Health Ordinances Developed Pursuant to RSA 41:8 and Groundwater Protection Act (RSA 485-C)**

*RSA 41:8 enables and empowers Board of Selectmen, as the local Board of Health, to adopt and use health ordinances as part of managing the prudential affairs of a town. Pursuant to RSA 41:8, can a municipality adopt a health ordinance to forbid the transfer an out of town sale of water to ensure that an adequate supply of clean drinking water will be maintained? Would this type of ordinance conflict with RSA 485-C:20 which establishes the process and criteria in which groundwater withdrawals that exceed 57,600 gallons over any 24-hour period be approved or denied? If there is a conflict between the provisions of RSA 41:8 and RSA 485-C regarding municipal or state authority to regulate groundwater withdrawals, what happens?*

Richard explained that he has a couple of thoughts about the question being posed. First, he explained, that he has had an opportunity to review some of the local ordinances that have been passed by towns pertaining to groundwater withdrawals. He explained that as a basic principle, you cannot pass ordinances that suspend constitutional rights. Richard explained that RSA 41:8 pertains to the prudential affairs of the towns. It is his understanding that prudential affairs pertain to the day to day operations and business affairs of the town. Richard explained that the language of RSA 41:8 would have to be broadly interpreted to be used as the enabling authority for municipalities to regulate large groundwater withdrawals. Richard also explained, any ordinance would have to be adopted using appropriate legal processes and not in conflict with state laws or the state and federal constitution. He explained that the municipal groundwater ordinances that he has read raise concerns in this area.

Representative Spang asked if municipalities can cite police powers to regulate groundwater withdrawals to protect water supply in the present and the future. Richard explained that municipalities only have authority to regulate activities that the legislature has granted them authority to regulate. Richard explained that municipalities can cite police powers if there is a water emergency.

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After the Commission completed its discussion on the four legal questions, Richard explained that he would be happy to work with the Commission to summarize his remarks today. He also explained that he would be happy to meet with the Commission again.

Representative Fargo explained that the primary message he thinks people will take away from today's discussion with Richard is that RSA 485-C:20 needs to be clarified.

Senator Spang and Senator Barnes agreed that the Commission should ask Cordell Johnston of the New Hampshire Municipal Association to speak to the Commission about the legal questions that were discussed with Richard Head. Cordell Johnston agreed and introduced himself as a municipal affairs attorney. Cordell explained that he may be able to elaborate on the premise that underlies question 4, but he was not prepared to ultimately answer the question today. Cordell explained that he believed there was a gap in the statutory references contained in question 4. He stated that RSA 41:8 enable the selectmen to manage the prudential affairs of a town. He explained that you then would have to look at RSA 147, which is the statute that pertain to health officers and health regulations. He explained that a provision in this chapter authorizes a health officer of the town to adopt regulations that are subject to approval by the selectmen. Cordell explained that in the absence of a health officer, the selectmen operate or act as the Board of

Health. Cordell explained that health officers have pretty broad and undefined authority to protect public health. Cordell believes that this was the gap in the question posed to Richard Head. Cordell explained that he could not provide a public answer to question 4 because the Town of Atkinson is a member of the Local Government Center. This means the Local Government Center may someday represent Atkinson relative to their groundwater regulations.

Sarah Pillsbury asked Cordell if any town has approached the Local Government Center with legal advice on a groundwater ordinance that is being modeled on the one promoted by the "Democracy School"? Cordell explained that he is not familiar with that particular ordinance. He explained that they have received attorney client privileged questions on the model ordinances.

Senator Barnes pointed out that health officers are appointed by the Department of Health and Human Services and not the Board of Selectmen.

Representative Spang suggested that the Commission end its discussion on the legal issues. She explained that some time should be set aside at the next meeting to go over the questions again once Brandon Kernan and Richard Head have summarized today's discussion. She explained that the Commission could then decide if another meeting with Richard was necessary.

The Commission then moved onto the next agenda - Review of the Issue 3-Hierarchy of Water Users Subcommittee Draft Report regarding the hierarchy of water users. The draft report was e-mailed to Commission members prior to the meeting. Jack Donohue, chairman of the subcommittee and Brandon Kernan summarized the subcommittee's work on the hierarchy of water users utilizing a PowerPoint presentation that along with a copy of the draft report is incorporated by reference to these meeting minutes.

Mason Westfall explained that he thinks it is critical that the Drought Management Plan be updated to include a water use hierarchy to address times of shortages. Brandon explained that DES agrees with Mason that the Drought Management Plan needs to be updated because it was last updated in 1990. He explained that the Drought Management Team will assist in this effort and potentially could consider the merits of suggesting a water use hierarchy.

Bob Snelling cited the following statement on the last slide of the PowerPoint presentation, "At this time, NH lacks the data that would be necessary to implement a technically defensible water use hierarchy." He felt that this was a very profound statement that Commission members should consider. Representative Spang explained that any hierarchy needs to be flexible to be appropriate for site specific or regional issues. For example, she explained that different regions of the state may have different environmental or economic stresses that warrant a water use hierarchy to result in different outcomes in one area of the state versus another. She also explained that each water user may have unique stresses and vulnerabilities that could be particularly susceptible to the impacts of droughts. She explained that provisions in a water use hierarchy need to consider this.

David Wunsch noted that parsing out all of the issues associated with how water is used or where the water came from is very complicated. He explained that some very small community water systems may be straight forward where all of the water comes from one well and it is all used to meet indoor water needs. On the other hand, you may have a large municipal water system that obtains water from both surface water and groundwater sources (one which may be more stressed than the other) and connections to the system may use water for many diverse purposes.

Bob Snelling stated that he believes the most important point to make is that New Hampshire does not have the data to determine when a water use hierarchy needs to be implemented. Additionally, he explained, we do not have enough information about how entities use water to apply a hierarchy correctly. Bob explained that these points are critical to note when we are trying to identify what a hierarchy of water uses should be. He explained that another subcommittee is evaluating data needs and their work can assist with addressing this issue.

Representative Fargo commented that approach 1 in the hierarchy report seemed analogous to how ISO New England manages power shortages during periods of high demand. He commented that approach 2 in the report seemed analogous to how different land conservation programs rank proposed projects for grant funding.

Bill Hounsell stated that the state should develop the educational materials that local governments can use to implement water use hierarchies. He explained that the cost for the state to implement a water use hierarchy state-wide along with the local misunderstanding of what that may mean would be a reason for the state not to administer a water use hierarchy. He explained that the state should assist municipalities with developing a list of actions that can be used to mitigate water shortages such as the development of alternative water sources or interconnecting with other water systems. He explained that this would be more beneficial than pitting water users against one another.

Representative Spang explained that she felt Table 2 of the draft hierarchy report lacked appropriate considerations for ecological habitat. She asked if anyone agreed? Bob Snelling explained he had more fundamental concerns such as the fact that we lacked appropriate data to implement a hierarchy of water users and determine when a hierarchy is needed. Bob explained that these outputs from the subcommittee are more important than developing an approach for implementing a water use hierarchy.

Representative Spang asked Commission members if they were ready to take a vote on the approval draft hierarchy report. Bob Snelling explained that he would like to see a succinct positive recommendation and conclusion section of the report.

Jim Griswold explained that the 10,000 gallon per day threshold utilized in the draft hierarchy report would significantly raise the data needs threshold. He felt that 10,000 gallons per day was too low and that a higher threshold should be used.

The next meeting was scheduled for Wednesday, November 12 at 1000 AM. The meeting was adjourned at approximately 1215 PM.

**The minutes of the November 12, 2008 Commission meeting will be published in the 2009 report upon being reviewed and approved at a Groundwater Commission meeting.**