

Groundwater Protection: What Can Municipalities Do?

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The Nature of Municipal Authority

New Hampshire is not a “home rule” state. Cities and towns in New Hampshire are political subdivisions of the state; as such, they have only the powers granted to them by the state legislature. In the absence of legislative authority, municipalities would not have the power to do anything at all. Thus, before local officials take any action to regulate or protect groundwater or other water resources, they need to make sure they understand the statutory source for their authority to do so.

The Groundwater Protection Act, RSA ch. 485-C, creates a fairly comprehensive scheme for the protection of groundwater at the state level. However, the statute expressly recognizes that “[b]ecause groundwater is primarily a local resource, cities and towns should have the first opportunity to institute programs for groundwater protection within the scope of this chapter. . . . The state . . . should develop groundwater protection programs within the scope of this chapter when such programs are not developed by a local entity.” The statute goes on to state, “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.”

Although chapter 485-C *recognizes* the right of municipalities to protect groundwater, it does not actually *grant* that authority. Instead, it refers to the authority of municipalities to enact ordinances under *other* statutes. Some of those statutes are discussed below.

Planning and Zoning Authority

Master plan

Perhaps the most commonly used basis for municipal regulation of groundwater is the planning and zoning authority granted by RSA chapter 674. Under RSA 674:1, every municipality that has a planning board is required to adopt a master plan, the purpose of which is to guide the board and the town in planning future development. The master plan establishes principles and goals, which are then implemented by the municipality's zoning ordinance and its subdivision, site plan, and other land use regulations.

Under RSA 674:2, the master plan may include “*a natural resources section* which identifies and inventories any critical or sensitive areas or resources.” With respect to groundwater protection, the natural resources section typically would identify wellhead protection areas and aquifers. Although this section is optional, it is strongly recommended that it be included; the identification of such areas will serve as the basis for protecting them through the use of groundwater protection provisions in the zoning ordinance.

Local water resources management and protection plan

The natural resources section of the master plan “should include a *local water resources management and protection plan* as specified in RSA 4-C:22.” Although the inclusion of such a plan is not legally required to enable the town to protect groundwater through its zoning ordinance, it is strongly recommended, because the master plan otherwise might not include the necessary data to support the relevant zoning ordinance provisions.

Further, inclusion of a local water plan allows the town to receive assistance in implementing the plan from the New Hampshire Office of Energy and Planning (OEP) (formerly Office of State Planning). Under RSA 4-C:19-23, OEP has established a water protection assistance program under which it provides technical assistance to municipalities to evaluate water resources and develop local and regional measures for the protection of both ground and surface water. The program is implemented through the regional planning commissions, and is coordinated with other state agencies, in particular DES.

The local water plan typically includes a description of surface water and groundwater resources, identification of potential surface water and groundwater supplies, identification of potential threats to water resources, assessment of future demand for water, description of the municipality's infrastructure, and description of existing programs and policies. OEP has published guidelines that indicate in more detail what information should be included. The regional planning commission can provide assistance in developing the plan. Once the local water plan is adopted, it must be filed with OEP.

Zoning ordinance

The zoning ordinance is the municipality's primary land-use regulatory tool. It is the zoning ordinance that implements the goals and recommendations of the master plan, including the local water resources management and protection plan.

Under RSA 674:17, I, a zoning ordinance is intended, among other things, “to promote health and the general welfare; . . . *to facilitate the adequate provision of . . . water*; . . . [and] to assure proper use of natural resources and other public requirements.” There is no question that this language authorizes a town to include provisions in its zoning ordinance to protect groundwater. Further, RSA 674:16 states that the power to adopt a zoning ordinance “expressly includes the power to adopt innovative land use controls which may include, but which are not limited to, the methods contained in RSA 674:21. The referenced section, 674:21, includes “environmental characteristic zoning” and “performance standards” in its list of authorized innovative land use controls.

“*Environmental characteristics zoning*” refers to the creation of zoning districts—typically overlay districts that apply to one or more geographic districts within the town—that are designed to protect certain environmental characteristics, such as wetlands, shorelines, or—of most interest to this discussion—groundwater. Most zoning ordinances have one or more of these overlay districts.

With “*performance standards*,” a zoning ordinance sets standards that apply to some or all uses, rather than focusing on what uses are permitted. This differs from the traditional approach to zoning, under which specific uses are prospectively permitted or prohibited. Under an ordinance that incorporates performance standards, *any* commercial or industrial use might be permitted so long as the use does not generate, for example, more than a specified amount of traffic, light, or noise. With respect to groundwater protection, the performance standards might include, among other things, specific stormwater management standards and requirements for storage of hazardous or regulated substances. The standards are enforced through periodic inspections.

Model ordinance. OEP and DES have developed a Model Groundwater Protection Ordinance, which a number of towns have used as a basis for their ordinances. The model ordinance creates a groundwater protection overlay district and includes performance standards for regulated substances within the overlay district, such as requiring best management practices for stormwater management and for storage of manure, fertilizer, and compost. It prohibits certain uses, such as solid waste landfills, junkyards, bulk road salt storage, and snow dumps, in the overlay district.

The model ordinance is available through OEP or DES, but a town should not simply copy the form and insert the town's name in the blanks. The town should review the ordinance carefully to coordinate it with its master plan and other parts of its zoning ordinance, and should consider whether all parts of the ordinance are appropriate for the town. For example, if a town does not have the resources to conduct periodic inspections

to ensure compliance with performance standards, it may want to rely more on the use restrictions in the model ordinance. On the other hand, if the town wants to be more flexible and is willing to conduct regular inspections, it may be less interested in the use restrictions as long as the performance standards are followed conscientiously. The town should consult with its planning director or the regional planning commission and/or OEP before proceeding very far on the adoption of a groundwater protection ordinance.

Site plan and subdivision regulations

Groundwater protection can also be addressed in a municipality's subdivision and site plan regulations, as either an alternative or (preferably) a supplement to covering it in the zoning ordinance. RSA 674:44 states that the site plan regulations adopted by the planning board may "guard against such conditions as would involve danger or injury to health, safety, or prosperity by reason of . . . *inadequate protection for the quality of groundwater.*" RSA 674:36 states that the subdivision regulations may "include provisions which will tend to create conditions favorable to health, safety, convenience, or prosperity."

Site plan regulations. A municipality may authorize its planning board to regulate site plans (for non-residential uses and multi-family developments) only if it has first adopted a zoning ordinance and adopted subdivision regulations. Once a municipality has adopted site plan regulations, anyone proposing to construct or expand a non-residential building or other non-residential development must first satisfy the planning board that the development satisfies the site plan regulations. Typical groundwater protection provisions in site plan regulations include requirements regarding stormwater management, landscaping, excavation, and discharges.

Subdivision regulations deal with the division of land into separate lots; they do not govern the design or construction of the buildings that may subsequently be constructed on those lots. (Subsequent construction may, however, be subject to site plan review if it involves non-residential or multi-family buildings.) Subdivision regulations may require, among other things, stormwater management plans, soil data, information regarding permeability and percolation rates, water table information, water and sewer supply plans, and designation of minimum buildable areas (excluding aquifers, wetlands, poorly drained soils, etc.). Other items subject to regulation, such as layout of roads and density of development, may indirectly affect groundwater availability and quality.

Pursuant to RSA 674:36, subdivision regulations may prohibit "such *scattered or premature subdivision of land* as would involve danger or injury to health, safety, or prosperity by reason of the *lack of water supply*, drainage, . . . or other public services, or necessitate the excessive expenditure of public funds for the supply of such services." Denial of a subdivision application on this basis alone is a rare occurrence and probably should be done only after consultation with legal counsel.

Site plan and subdivision regulations can be much more flexible than the zoning ordinance—they might include very specific technical requirements that would be too

detailed for a zoning ordinance, but at the same time they can (and should) include a catch-all provision to the effect that “adequate provision shall be made to minimize adverse impacts on groundwater.” Such a provision will give the planning board broad discretion in deciding what level of protection is necessary for a particular use, rather than relying solely on uniform standards that might work in one case but not in another.

Another advantage of subdivision and site plan regulations is that the planning board may adopt and amend these regulations on its own (after a public hearing), without obtaining town meeting approval (assuming that the town has *previously* voted to authorize adoption of such regulations). In some municipalities, the effort involved in educating voters about the importance of groundwater protection and getting them to understand a detailed zoning amendment may delay adoption of an ordinance for several years. Even where that is not a problem, town meeting happens only once a year—if the planning board decides in April that it wants to enact stronger groundwater protection measures, it may have to wait eleven months to amend the zoning ordinance, but the board’s regulations can be amended in a matter of weeks.

Health Ordinances—Inspections

Apart from zoning and planning authority, towns have fairly broad authority under RSA 31:39 (which authorizes the adoption of ordinances for various purposes) to enact ordinances relating to health, welfare, and public safety, and this clearly includes ordinances to protect groundwater. Further, under RSA ch. 147, town health officers have authority to make “regulations relating to the public health,” subject to approval by the selectmen, and to investigate “nuisances and other causes of danger to the public health.”

Under these statutes, even if a town does not choose to enact a comprehensive groundwater protection ordinance, it can adopt ordinances and regulations governing matters affecting groundwater, such as septic systems (specifically referred to in RSA 147:10), solid waste disposal, snow storage and removal, and plumbing standards, so long as they are not inconsistent with state laws or regulations. The health officer may inspect properties to ensure compliance with the town’s ordinances and regulations.

As stated above, zoning ordinances generally operate by permitting or prohibiting certain uses in certain districts. Unless the ordinance incorporates performance standards under RSA 674:21, a given use will be either permitted or prohibited without regard to how well or poorly it is managed, and there is no inspection to ensure compliance with any performance standards. Further, the zoning ordinance has little say over pre-existing uses. In contrast, ordinances and regulations protecting the public health and welfare under RSA 31:39 and chapter 147 typically do not prohibit specific uses; instead, they apply standards, enforced through inspections, to *all* uses, including pre-existing uses.

Groundwater Protection Act

Reclassification—management and inspection

The Groundwater Protection Act provides another mechanism for local regulation of groundwater resources through inspection of potential contamination sources and enforcement of best management practices. The Act establishes four classes of groundwater:

GAA—wellhead protection area for wells presently used or well sites identified for future use as public drinking water supplies.

GA1—defined zone of high value for present or future drinking water supply.

GA2—aquifers identified as highly productive for potential use as public water supply by US Geological Survey regional studies or other regional studies.

GB—all other groundwater.

Under 485-C:9, a municipality (including a village district) may request reclassification to class GAA or GA1 by submitting a written request to DES. The request must include (a) a delineation of the area; (b) a potential contamination source inventory (“potential contamination sources are listed in the statute, and include service stations, manufacturing facilities, storage facilities for oil and hazardous substances, roads, septic systems, salt storage areas, and many others); and (c) a potential contamination source management program, to be implemented by the municipality. DES will reclassify the groundwater if it finds that the proposed reclassification meets all the requirements of the statute and rules thereunder.

If DES grants reclassification, the municipality is responsible for managing the potential contamination sources. The management program consists of: (a) updating the inventory of potential contamination sources at least every three years; (b) notifying owners of potential contamination sources at least every three years that their activity is being conducted within a protected area—the notice must state that such activities are subject to best management practices and provide information about where to obtain copies of applicable best management practices; (c) inspecting all potential contamination sources at least every three years to determine compliance with best management practices; and (d) enforcing rules for best management practices.

Other local roles under Groundwater Protection Act

Notice of potential contamination source activities. Whenever DES receives an application for a permit that’s required for an activity classified as a potential contamination source (not all such activities require state permits), and the activity is within a GAA or GA1 area, the state must notify the local governing body, and suspend

action on the application for 30 days. The municipality may make recommendations during that period. If it does, DES must make written findings explaining any deviation from the recommendations.

Groundwater withdrawals. No “person” (including a municipality) may withdraw 57,600 gallons or more of water per day without DES approval. The state has exclusive authority over such withdrawals. (Through the site plan review process, the municipality may regulate other aspects of the project, but approval of the water withdrawal itself is exclusively up to the state.)

However, the state permitting process (RSA 485-C:21) requires applicants to send copies of the application to the governing body of each municipality within the zone of contribution to the well. The governing body has 15 days to request a public hearing. *If no municipality requests a hearing, none is required.*

If a hearing is requested, DES must hold one within 30 days after the request. The governing body of each municipality within the zone of contribution may submit written comments up to 45 days after the hearing (or, if no hearing is requested, 45 days after receipt of the application). If the written comments make recommendations, DES must specifically consider and address each recommendation.

So, if a municipality has concerns about a large groundwater withdrawal, it is *essential* that it request a hearing, and it’s a very good idea to submit recommendations if the town has any. An affected municipality has a right to appeal to superior court if it is unhappy with the DES decision, but it obviously cannot do that if it hasn’t requested a hearing in the first place. And if it fails to make specific recommendations to DES, it may be deemed to have waived its arguments. In any event, there will be a clearer record for appeal if recommendations are submitted in writing.

Municipal enforcement of the Act. DES and local health officers have concurrent power to issue cease-and-desist orders for violation of 485-C. Anyone who receives an order from a local health officer may, within 15 days, ask DES to review it. DES may either enforce it or not.

Summary

Planning and zoning

Adopt a master plan (and keep it updated)

Include a natural resources section.

Include water resources management and protection plan.

Describe surface and groundwater resources; identify potential threats; assess future demand; describe infrastructure; describe existing programs and policies.

OEP water protection assistance program.

Zoning ordinance

Use “environmental characteristics zoning” to preclude certain uses in groundwater protection district.

Use performance standards and inspections for ongoing activities.

Model ordinance—uses both approaches.

Site plan regulations

Town must first adopt a zoning ordinance and subdivision regulations.

Site plan review applies to non-residential and multi-family developments.

May include provisions for “protection for the quality of groundwater.”

Stormwater management, landscaping, excavation, discharges.

Subdivision regulations

Deal with division of land, not design or construction of buildings.

May require stormwater management plan, soil data, permeability and percolation data, water table information, water and sewer plans, minimum buildable areas.

Health ordinances

Town may adopt ordinances relating to health, welfare, and public safety.

Health officer may make “regulations relating to the public health,” subject to approval by selectmen. May regulate matters such as septic systems, solid waste, snow storage and removal, plumbing standards, if not inconsistent with state law.

Independent from zoning power—health officer may conduct inspections.

Groundwater Protection Act

Reclassification

Municipality may request reclassification of groundwater to higher class.

Request must include a potential contamination source management program, to be implemented by the municipality.

Program includes: updating inventory of contamination sources at least every 3 years; regular notice to owners; regular inspection; enforcement of best management practices.

Notice of potential contamination source activities

State must notify municipality and suspend action for 30 days.

Groundwater withdrawals

Use site plan review to regulate aspects other than the withdrawal itself.

Request DES hearing; submit recommendations.

Municipal enforcement

Local health officers have power to issue cease-and-desist orders.