

# WATER ALLOCATION PROGRAM DEVELOPMENT WATER RIGHTS SUBCOMMITTEE MEETING

## MINUTES OF MEETING

8/5/03

### Members Present:

John Garry  
Al Bettencourt  
Annette Jacques  
Caroline Karp  
Brian Bishop  
Jon Schock  
Gregory Schultz

### Members Absent:

Dale Thompson  
Kendra Beaver  
Fred Cosby  
Christopher D'Ovidio  
Mary Ellen McCabe  
Rebecca Partington  
Ken Payne  
Paul Ryan  
John Spirito

### Guests

Sandy Bell, student intern  
Lauren Plante, student intern  
Bill Stamp, board member

### WRB Staff Present

Connie McGreavy  
Kathy Crawley

### I. CALL TO ORDER:

Mr. Garry called the meeting to order at 1:30 PM.

### II. APPROVAL OF MINUTES:

On a motion by Mr. Schock, seconded by Ms. Jacques, the minutes of the July meeting were approved.

### III. ITEMS FOR ACTION:

#### A) Status Reports from Subgroups: Drought, Groundwater and Takings

Mr. Garry noted that Mr. Bishop was not present and deferred the Drought Report until the September meeting. Ms. Jacques has been reviewing case law and other research for a memo she is preparing on groundwater rights. She mentioned that Nebraska has a new statute elevating domestic water use over agriculture. She will review the Regulated Riparian Model Water Code, the AWWA IMPACT publication which features eastern and western water law and reports from the state of Georgia. Ms. Jacques would like to know which states are using the Code, how it is being litigated and how are the courts interpreting it. She plans to report next month and may recommend a statutory scheme to replace Rhode Island's common law scheme. Mr. Garry will contact Mr. Thompson to further identify relevant cases and law regarding private property rights takings. He expects to use student interns to prepare a draft in time for the September meeting also. Mr. Garry asked the Agriculture Group and the Drought Management group to pool information for the draft report by the next meeting.

## **B) Input to Education Committee**

Ms. McCreavy explained the purpose of the education message matrix. She reminded the committee that they had made three suggestions at the July meeting: 1) a brochure to explain the regulatory process for various constituencies such as individual homeowners, businesses and developers; 2) a summary of water rights (Who owns the water?); and 3) information for private well owners.

Ms. Karp added that any information package should include a description of which agencies have authority to issue permits. She felt that municipal governments and legislators should be targeted. Ms. Jacques stated that the American Bar Association, RI Chapter, has an environmental committee (also a land use committee), and this would be an important group to educate. Mr. Schock reiterated the need for people to know which agencies have jurisdiction over surface and groundwater. Ms. McCreavy explained that the Regulatory Authority diagrams were the tools that the committee agreed to use to illustrate these topics. They will be interactive; the boxes in the diagram will be linked to statutes, regulations and to agency web pages. Mr. Stamp asked how exemptions would be depicted. Ms. McCreavy explained that agricultural exemptions would be footnoted.

The group agreed to put forward the suggestion for a brochure, as well as the web tool, to educate the public about the regulatory process. The committee also agreed that the summary of water rights should address common law, state law, and the concept of reasonable use. Mr. Stamp believed that offering too much information to the public was a potential problem. Committee members countered that more information is better because there is none out there now. Mr. Stamp added a fourth item, that stewardship be promoted among all water users. Ms. McCreavy will package the education messages and forward them to the Education Committee.

## **IV. ITEMS FOR DISCUSSION:**

### **A) Deficiencies in Water Rights/Law**

The Committee discussed the fact that Rhode Island has little case law regarding water rights. Ms. Karp felt this should be added to the list of deficiencies in water rights law that the committee is working on. She is concerned about exporting water to non-riparian lands and mentioned that California allows export, as long as there is no harm to other users. Ms. McCreavy proceeded to review each item on the list:

#### 1) No water quantity evaluation of withdrawals

Ms. Karp stated that the burden of proof regarding water availability (in terms of the resource) was important, and asked whether someone needed to sign off on estimates provided at the local level as part of zoning and subdivision planning. Mr. Schock explained that in South Kingstown, the Water Dept. issues a certificate that a new development can be supported. It is part of the building permit process. Mr. Garry commented that many assumptions are made in the process. Mr. Stamp indicated that the court system is the vehicle to handle disputes. Ms. McCreavy stated that the objective of the water allocation initiative is to avoid conflict, which is costly, and add certainty. Ms. Karp stated that in Jamestown, there should be limits to growth, based on limited supply. Mr. Stamp

felt water should be moved to Jamestown instead. Mr. Bettencourt discussed compensation for water. Ms. Karp answered that this leads to speculation. Mr. Stamp wished to use market incentives to conserve water and price water to reflect its true cost.

Mr. Garry felt the cost to prove water availability was too high for an applicant to bear. Ms. Crawley reminded the group of the water use & availability studies. Ms. McGreavy stated that the Out-of-Basin Transfer Committee was recommending project evaluation at the local level, potentially based on a certain size threshold. Ms. Karp referenced her student's report which suggested that money raised through a surcharge on water rates could be used to pay an independent entity (the US Geological Survey) for determining the adequacy of the water supply. Mr. Schock added that there needs to be consistency in how safe yield is calculated. In addition to the need for a method to better evaluate withdrawals, potential solutions for item #1 were to provide legal clarification of public & private uses and interests in water (education message) and to provide market incentives.

#### 2) No stream flow standards

Ms. Karp stated that federal law is plain on stream flow and that this item should be removed from the list. Ms. Crawley explained that the Stream flow Committee is looking at methods to determine a standard that may take the form of a regulation as part of the RI Dept. of Environmental Management's (DEM) existing freshwater wetlands permitting program and water quality certifications process. She felt that clarification was needed regarding how stream flow will fit into the overall water allocation program. She added that the Code provides that water be "reserved" for streams. Mr. Schultz stated that DEM gets involved when there is an environmental impact, and that the stream flow issue is broader than standard setting. Ms. McGreavy and Ms. Karp indicated that drought and growth considerations were related. Mr. Bettencourt felt that stream flow data should be used as a management tool only. The group agreed to require DEM to integrate new standards for existing permit programs with water allocation program objectives.

#### 3) No regulation of private withdrawals

Mr. Schultz suggested this item be revised to "unclear" regulation of private withdrawals. Mr. Garry stated that this might require a new state law. Ms. McGreavy stated that the Water Rates Committee recommended a database be established to capture information on private wells. The group agreed there was a need to identify self-supply users and educate them.

#### 4. Various degrees of water supplier regulation during shortages

Mr. Schock did not feel this item should be on the list, as it is up to the water suppliers to manage their supplies (how much water exists, how it is distributed, and at what point conservation measures kick in). Ms. Crawley mentioned that enforcement of water restrictions during drought was problematic and that there is overlap between municipal authorities and water districts. A question was posed regarding the appropriate role of the state, beyond the water supply system management plan process. The group agreed that integration of water and

wastewater considerations and more coordination/education would help address the problem.

5. Lack of written agreements between suppliers, including interstate agreements

Mr. Garry asked if there was a need for agreements, and if so, where. Ms. McGreavy explained that there were various water suppliers who had water sales agreements in place, and some of these were between neighboring states. She added that suppliers admit that their agreements are old or expired in many cases; none of the suppliers that serve, or are served by, neighboring states has federally approved compacts. Ms. Karp referred to the New England Interstate Water Pollution Control Commission's (NEIWPPC) compact, which is designed to manage regional water resources. She thought there was also an agreement between Rhode Island and Massachusetts concerning the Blackstone River. Ms. McGreavy stated that Rhode Island only had one delegate on the Commission versus the five it was entitled to. Jan Reitsma, DEM director, is the primary member for the state. Ms. McGreavy was not certain that the compact applied to water quantity issues, since it was formed to address water quality issues. Ms. Karp thought that it might. Ms. McGreavy mentioned a separate initiative to establish an interstate agreement between Massachusetts and Rhode Island (Bay Trust legislation). Ms. Karp did not feel this was needed.

The committee agreed that more enforcement of water supply system management plan provisions was needed and that agreements between suppliers and neighboring states should be evaluated and made current. The group also favored increasing Rhode Island's representation on NEIWPPC and to investigate whether the NEIWPPC compact could be used to manage interstate water supply.

6) No tribal compacts

Ms. McGreavy explained that the Narragansett Tribe has been given an EPA status of "Tribe as a State" (TAS). This means that in some cases, the tribe can bypass state government and work directly with federal authorities. She explained that the tribe had hired a consultant to evaluate its water supply. She recommended that this committee should acknowledge the lack of a compact and at the very least, suggest that the tribe's water right be quantified. This is what other states have done. The group agreed with the suggestion to quantify the water right [for hunting, fishing, subsistence farming].

7) Little integration of water and waste water

The committee discussed the importance of finding solutions that do not involve regulation, such as reusing wastewater and returning water to the basin of origin. Discussion ensued regarding revising the building/plumbing codes to provide for gray water lines in new developments. Ms. McGreavy mentioned that the Water Rates Committee had recommended that water and wastewater bills be integrated. Other members discussed developing standards to reuse water for use on nonfood crops, golf courses and for industrial cooling. Ms. McGreavy stated that a member of the Water/Wastewater Committee from DEM was working on standards.

8) Redundancy: water management plans (WHP, WSSMP, SWAP, Infrastructure)

It was acknowledged that water suppliers are doing a lot of work for multiple agencies though information is being used for different purposes. Ms. Karp stated that the Wellhead Protection Plans are required by federal law. Ms. McGreavy believed that DEM might recommend moving the program to the RI Dept. of Health. Mr. Schultz will check on the status of that program. Ms. Karp stated that there is overlapping authority in coastal areas between DEM and the RI Coastal Resources Management Council. Both Ms. Karp and Mr. Schultz felt that there should be one agency to oversee coastal zone management, not two. A recommendation that CRMC revisit its permit standards for extending pipelines (water and wastewater) in the coastal zone was suggested. Ms. Karp added that some redundancy is good, in that it allows a fall back position. A potential solution was to investigate where the process could be streamlined or whether plans could be consolidated. The Governor's Fiscal Fitness Program was acknowledged as a vehicle through which institutional and/or program changes may be recommended.

9) Emergency management coordination

Ms. McGreavy remarked that the State Guide Plan Element 723, Water Emergency Response Plan is dated (22 years old). It needs to be revised to be consistent with current practices and the state's Emergency Operations Plan (EOP). A question was asked regarding who has authority to declare a water supply emergency. An emergency can be related to: a) Water quality, b) Water quantity; c) Contamination; and/or d) Drought. Ms. McGreavy responded that the Governor has ultimate authority, but water suppliers can declare local emergencies. It was agreed that authority at the local level needs to be clarified and that the state EOP should be consistent with the State Guide Plan and the water emergency response plans of suppliers. Mr. Garry stated that local governments could pass more stringent ordinances than the state. Ms. Karp stated that water availability should be considered in build out analyses every five years as part of the Community Comprehensive Planning process. Ms. Crawley noted that Massachusetts uses a uniform methodology and has completed build-out analyses statewide. Ms. Karp did not feel it made sense for the state to do the build-out for Rhode Island. All agreed that there were conflicts between state laws, local ordinances and codes, and that model ordinances was one way to address the problem.

10) Out-of-basin transfer rules differ in certain areas

Ms. McGreavy stated that CRMC prohibits OOBT in certain coastal areas with Special Area Management Plans), but that water suppliers routinely (and legally) transfer water out of basins. Ms. Karp stated that prior appropriation of water rights should be recognized (deeded rights, farmers, Audubon Society, etc.). She would like to see environmental groups prepare legal briefs on the topic. Mr. Schultz asked whether the state Attorney General had issued an advisory opinion. Ms. Karp went on to say that agriculture is a minor water use in the state, and that the state needs better estimates from irrigators [to understand out-of-basin impacts]. Ms. McGreavy noted that SAMPs and SGP Elements are not officially recorded in the Sec. Of State's rules database.

**B) Report Generation**

Ms. McGreavy explained the need to make progress on the report. At the very least, recommendations would need to be drafted next month.

**C) Interfacing with the WAPAC**

Ms. McGreavy explained that the Water Rights Committee will present its findings to the full WAPAC in January and may need to react to recommendations put forth by other committees.

**V. OTHER BUSINESS:**

Ms. Karp agreed to review the Priority Uses resolution in time for the September meeting. Mr. Bettencourt stated that there was not a list of priority uses, but that generally, priorities were: 1) drinking water; 2) agriculture; and 3) commercial or industrial uses. Ms. Karp felt that more guidance was necessary and that there were safe yield and equity issues to address. She did not wish to see the state get into the situation where one group was totally left out. She added that society has changed and we must decide how to divide water in times of scarcity and decide who gets water first. Mr. Stamp wished to see market incentives to allocate water (versus bureaucracy), increased storage and sewer separation. Ms. McGreavy mentioned that some states trade water rights, but that this committee did not have time to explore some of these areas. Ms. Karp replied that water scarcity can come about due to lack of precipitation, population growth or contamination of supply, and that it was important to establish how water use reduction should occur. It was acknowledged that more metering is needed in order to monitor water resources during times of water scarcity.

The next meeting was set for Tuesday, Sept. 2, 2003 at 1:30PM at the RI Water Resources Board.

**VI. ADJOURNMENT:**

The meeting adjourned at 4:30 PM.

Respectfully submitted,

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Date

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Connie McGreavy, RI Water Resources Board