

What's New with Jon

April 21, 2008

Dear Constituents:

My report for the week ending April 18, 2008 is as follows:

1. The Budget – On Tuesday, we learned that updated revenue projections indicate the State has an about \$24,000,000 hole in the general fund budget. By Wednesday noon, \$44,000,000 in possible cuts was listed. This was reduced to about the right number by late Friday afternoon. Thank you all for your comments, all of which I passed on to the Appropriations Committee. Led by Martha Heath, that Committee does an incredibly tough job very well.
2. PILOT – One of the possible general fund cuts is to move the source of funding for about \$225,000 in PILOT from the general fund to a fund generated from the requirement that 30% of all local option taxes be remitted to the State. That fund has more than projected when the House passed its budget. So the effect is that Montpelier will receive the same additional \$133,000 in PILOT money next year—one of the largest increases ever—representing a more than 2 ½¢ reduction in Montpelier's tax rate. The downside of this shift is that if we did not have the budget problems that we do in Montpelier, the shifted money remained in the general fund budget and the 30% fund was not raided, Montpelier would have received another \$30,000 in PILOT money.

I spent a lot of time this week following this including a special meeting with Steve Klein at Joint Fiscal to understand the proposed shift, which could be a lot worse. Immediately after my meeting with Steve Klein on Wednesday at noon, I briefed Warren Kitzmiller and called both Bill Fraser and Bev Hill. (I was so anxious to brief City officials I even called Bev at home.) Bev and I discussed the shift at the State House at noon on Thursday.

At first, the City was okay with the shift. On Saturday morning, however, I saw an e-mail to the Washington County Senators, Warren and me indicating that the City wanted to take a position avoiding the shift. I called Bev on Saturday, pondered all day how we should do it, and called Jim Hutchinson (D-Randolph), with me one of the leaders of the PILOT caucus and a member of the Appropriations Committee, on Saturday night. As I write this, I am in the process of arranging a meeting with Jim, other legislators, and City officials at the State House for Tuesday morning.

3. Current Use – We passed from our Committee a very good bill updating current use. I participated in deleting a new fee on all participants to raise money for computerization. The Administration said it could computerize in about three year without the fee. Instead, we imposed a requirement for the Administration to report progress versus the schedule it provided.
4. Groundwater – My Committee worked late on Friday in an effort to close the only issue on which we do not agree—the definition of the public trust doctrine to be included in the bill. Although we were close, we were unable to bridge the gap so we will return Monday afternoon.

In order to address unnecessary attacks in a possible floor fight over the bill, I have suggested inserting language to define what adoption of the public trust doctrine does not do. Thus, the bill now contains a provision preserving legal access to all wells and springs. Another possible attack was that the public trust doctrine would allow people from across town to oppose allowing Wal*Mart to drill a well by arguing that its employment practices violated the public trust. We left off on Friday trying to draft language that the public trust doctrine could be used by individuals to protect their “particularized interest” in groundwater.

I am pleased to have also inserted increased notice of and a hearing on any permit for groundwater withdrawals and to have deleted a provision designed to chill groundwater suits by poor people requiring a losing party to pay the winner’s legal fees.

Attached is a commentary I have submitted further discussing the groundwater bill.

As always, thanks for the opportunity to serve.

Very truly yours,

Jon Anderson

Attachment

This message is intended to reflect my personal view of issues facing the Legislature. It is NOT intended to be a comprehensive or thorough discussion of any topic, just a few lines to stimulate thought. If you would like to be added to my subscriber list (or removed from it), please send an email to: janderson@vtlaw1.com. Please feel free to contact me if there is anything I can do to assist you in dealing with Vermont Government.

Please join me in supporting S.304, a bill to regulate groundwater withdrawals, as revised by the House Fish, Wildlife, and Water Resources Committee, of which I am a member. The bill's goal is to provide groundwater protection that is equivalent to the same level of protection provided to surface water. This bill particularly benefits farmers and the roughly two-thirds of all homeowners in the state who draw their water for sustenance from the ground.

As long ago as the 1820s, the Vermont Supreme Court decided that while we own and use surface water in common under the legal doctrines of public trust and riparian use, landowners owned outright the water in the ground under their land. Under this doctrine a landowner could draw an aquifer dry without consideration of their neighbors' needs or dependence on such aquifer. Not only did this doctrine of outright ownership fail to protect a homeowner's reasonable use of his well, but the doctrine was also scientifically wrong because surface and ground waters interact with each other. There is no reason to distinguish between the two.

In 1985, the Legislature began correcting this ancient judicial mistake by abolishing "the common law doctrine of absolute ownership." Instead, it decided that the doctrine of reasonable use should govern groundwater in the State, which is similar to one of the legal doctrines that apply to surface water—riparian use. Since that time, Vermont has regulated groundwater withdrawals for drinking including, as of 2005, withdrawals for bottled water based on reasonable use.

The current regulatory system is inadequate, however. No one is charged with reviewing the impact of groundwater withdrawals for non-drinking water uses by projects that do not trigger Act 250 jurisdiction. Even when non-drinking water is withdrawn by projects subject to Act 250 jurisdiction, for example irrigation at golf courses, the State does not review the impact of the withdrawal on neighboring wells.

S.304 seeks to fill in this gap by regulating groundwater withdrawals large enough to affect others (over 57,600 gallons per day, which equals a rate of 40 gallons per minute over a 24-hour period). Agricultural and existing uses are excepted from this permitting requirement. At first, I questioned whether the proposed permitting standards were sufficiently specific. Well-respected hydrogeologists testified without opposition before our Committee that regulations can be written that clearly define

how the permitting standards will be applied. These regulations will be drafted under the Governor's purview and the Legislature will review them prior to their adoption.

In most cases, demonstrating compliance with the new permitting standards will not cost more than the current standards for withdrawing drinking water, except that the new standards include additional consideration for withdrawals affecting wetlands. The hydrogeologists who testified before our Committee agreed, however, that a regulation could be written that substantially reduced this cost for most users, as for example, when a proposed withdrawal will obviously have no impact on significant wetlands.

The goal of S.304 is to equalize the treatment of ground and surface water by applying the public trust doctrine to groundwater, similar to about half the states in America. As recommended by our Committee, S.304 contains a specific declaration that the public trust doctrine does not affect legal access to groundwater including, for example, deeded spring rights. Our Committee also proposes to clarify that the public trust doctrine may be used only to protect the particularized interests of individuals. In other words, you may be able to sue to prevent water withdrawals affecting your well, but you cannot use the doctrine to oppose water withdrawals by larger retailers by, for example, basing such opposition on a claim that their employment practices are not in the public interest.

In sum, S.304 is a necessary and good bill that should be passed and signed this year.

Jon Anderson (D-Montpelier) is a member of the Fish, Wildlife and Water Resources Committee and practices land use and environmental law at Burak Anderson & Melloni, PLC.