

BASIS STATEMENT
Ch. 342, Significant Groundwater Wells
November 6, 2008

The Department of Environmental Protection (“department”) was required to adopt rules by PL 2007, ch. 399(14) and (15), which provide:

Sec. 14. Rulemaking public information meetings. The Department of Environmental Protection and the Maine Land Use Regulation Commission shall amend their rules to require that a public information meeting be held prior to submission of an application for a significant groundwater well. The public information meeting must meet the requirements for public information meetings contained in the Department of Environmental Protection's rule concerning the processing of applications and other administrative matters. Rules adopted pursuant to this section are routine technical rules as defined in the Maine Revised Statutes, Title 5, chapter 375, subchapter 2-A.

Sec. 15. Rulemaking independent monitoring; fees. The Department of Environmental Protection and the Maine Land Use Regulation Commission shall periodically contract with independent environmental professionals to provide a technical review and assessment of monitoring information submitted to the Department of Environmental Protection or the Maine Land Use Regulation Commission related to significant groundwater wells, and each shall through rulemaking develop a fee structure to provide funding for the contracts. Rules adopted pursuant to this section are routine technical rules as defined in the Maine Revised Statutes, Title 5, chapter 375, subchapter 2

The department also proposed adding a pre-application and pre-submission requirement to the application process for significant groundwater wells requiring a permit pursuant to the Natural Resources Protection Act (NRPA).

On August 7, 2008, the Board of Environmental Protection (BEP) posted this chapter to public comment without a hearing. The comment deadline was September 19th, 2008 at 5:00 pm. Comments were submitted by the following three persons.

- (1) Paul E. Philbrick, President, ELCO Electric
- (2) Phillip F.W. Ahrens, Esq., Pierce Atwood, on behalf of Poland Spring
- (3) Scott D. Anderson, Esq., Verrill Dana

The source of each comment below is indicated in parenthesis, by number, at the end of the comment. One person requested a public hearing. The DEP is required to hold a public hearing if requested by 5 interested persons. See 5 MRSA § 8052(1).

Correction: the “Authority” provision following the text of Chapter 342 was not completed in the posted draft. The department proposes to include the following listing after “Authority”: 38 M.R.S.A. § 341-D(1-B) and PL 2007, ch. 399(14) and (15).

1. Comment. Although the niche we are seeking to develop for our company involves ground source closed loop (non water well drilling) heating solutions, occasionally an open loop situation presents itself involving an existing or new well as the source for geothermal heat energy extraction. An open loop solution sometimes makes the best economic sense for a prospective customer. In this regard, we find several areas of the proposed rule objectionable, as the rule seems overly far reaching and the consequences may be unintended.

Particularly, the definition of “significant groundwater well is troublesome. The minimum water extraction threshold potentially impacts any homeowner living in a typical small one story ranch style home and considering a geothermal heating solution. The additional constraints including a 500 foot minimum distance to an adjacent property owner’s water well, a vernal pool habitat, etc., combined with the permit application requirements, necessity of a public hearing in order to obtain a permit, and recurring annual \$250.00 permit renewal fees, and you have essentially killed one of the most common type of ground source heating installations for property owners in the State of Maine. Is that the intended result of adoption of this rule?(1)

Response: Chapter 342 does not establish a permit requirement; the threshold for when a permit is required is in statute. The rule does not require a public hearing, or establish a minimum 500 foot minimum setback. The rule is intended to establish a fee structure to support third-party analysis of monitoring data, and provide for a public information meeting, as required by recent legislation. See PL 2007, ch. 399(14) and (15). The rule also requires an applicant for a permit for a significant groundwater well to attend a pre-application and pre-submission meeting, using existing procedures in department rules Chapter 2. The department’s experience is that attendance at these meetings improves the efficiency of the application process for both the applicant and the department.

Chapter 342(3) defines “significant groundwater well” for purposes of the rule. The definition excludes:

“A well authorized by the department under the NRPA or the Site Law for which the department has not required monitoring related to pumping or water levels, other than during the initial pump test and any background and recover monitoring.”

Because the new fee is intended to support assessment of long-term groundwater quantity monitoring data, the department proposed to exclude wells from the fee requirement that were not required to provide such data to the department. The department has never required long-term groundwater quantity monitoring data from a permittee with a project including an open-loop geothermal system, and expects such a case-by-case requirement to be rare. However, if a project were proposed where this monitoring were appropriate, such as where a surface water body could be affected by the pumping, then application of the fee would be appropriate.

2. Comment. In two areas the language in the draft rule appears to expand what was covered by the authorizing legislation and should be modified. We believe that the language in the authorizing legislation should be controlling.

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The first concern is with respect to paragraph 3(b)(2)(a) of the draft rule, which states that a “significant groundwater well” does not include:

(a) a well authorized by the Department under the NRPA or the Site Law for which the Department has not required monitoring related to pumping or water levels, other than during the initial pump test and any background and recover monitoring.

That language appears to expand the language contained in the authorizing legislation, now codified at 38 M.R.S.A. § 480-B(9-A)(B)(4) which exempts from the definition of a significant groundwater well “a development or part of a development requiring a permit pursuant to article 6, article 7 or article 8-A...”. Consequently, we suggest the language in the draft rule at 3(B)(2)(a) be revised to read “a development or part of a development requiring a permit pursuant to the Site Law.” (Footnote 1) It does not appear to be necessary to reference the laws pertaining to borrow pits or quarries, although those articles were mentioned in the authorizing legislation.(2)

Response. Title 38, section 480-B(9-A) defines “significant groundwater well” for purposes of the NRPA, and the permitting requirement. It is not the “authorizing legislation” for Chapter 342, and does not define “significant groundwater well” for purposes of this rulemaking on fees.

Chapter 342 defines “significant groundwater well” using the same withdrawal criteria as in the NRPA, for the sake of consistency and simplicity. However, the definition diverges so as to apply the proposed fee equitably to wells permitted under the Site Law as well as the NRPA, and specifies certain exclusions. If the provision were revised as requested, the fee would not apply to the largest developments in the State withdrawing groundwater, with the most extensive monitoring programs.

3. Comment. The second concern is with the paragraph that follows 3(B)(2)(d) which attempts to modify the language and intent of the authorizing legislation. In the first sentence of that paragraph, the word “facility” should be changed to read “public water system” in both locations where the word “facility” is used. Also the second sentence of that paragraph should be deleted altogether. The exemption from the definition of significant groundwater well in the authorizing legislation is for “a public water system as defined in Title 22, section 2601, subsection 8, other than a public water system used solely to bottle water for sale.” The second sentence in the paragraph referenced above in the draft rule would require that a single well, otherwise a part of a public water system as defined by statute, would be considered as a significant groundwater well, something that was not contemplated by the authorizing legislation and not contained in the statute.(2)

Response. In the first sentence of the paragraph that follows Section 3(B)(2)(d), “facility” has been changed to “public water system” in both locations as suggested.

The second sentence that follows Section 3(B)(2)(d) does not modify language in the authorizing legislation. The unallocated provision in PL 2003, ch. 399 uses the term “significant groundwater well” but does not define the term. The term is defined in Chapter 342, and the sentence is part of the definition.

4. Comment. The proposed rule goes beyond setting fees and public notice requirements, and appears to address a substantive matter regarding the scope of the “significant groundwater well” provision added by Chapter 399 to the Natural Resources Protection Act (NRPA). See 38 MRSA §480-C(4).

The statute provides that “significant groundwater wells” do not include “public water systems,” other than such systems that are used “solely to bottle water for sale.” 38 MRSA §9-A(B)(1). An example may help in understanding the concern regarding this provision. In Fryeburg, the Fryeburg Water Company operates three wells, two of which provide water to municipal customers and one of which is devoted exclusively to supplying water to Poland Spring. The well used to supply Poland Spring is not connected to the Fryeburg Water Company’s water lines and all of the water extracted from it is bottled and sold by Poland Spring. It is unclear at this point, given the exception noted above, whether this Poland Spring extraction site is regulated under NRPA. Although the well is used “solely” for bottled water purposes, it is unclear whether the Department would conclude that the well was not subject to NRPA, because the Fryeburg Water Company system was not used solely for that purpose. This is clearly not the intent of the statute, which was enacted, in large part to regulate commercial water extraction operations.

Although the initial language in Chapter 342(3)(B)(2) regarding “*de minimus*” use seems appropriate (because a well owned by a bottling company should not be exempt from review because some small part of the water is used for other purposes), the latter portion of the language does not offer any clarity to the statute. In the Fryeburg example noted above, the entire output of the well serving Poland Spring is used by Poland Spring. However, the uncertainty remains whether this well is subject to the NRPA.

Due to the potential impact of the exemption for public water systems, this language requires much more thoughtful and conspicuous attention. Indeed, our understanding from conversations with the Department is that this issue is to be clarified by an amendment to the statute, to ensure that all wells operated solely for the purpose of extracting and transporting water for bottling will be regulated under NRPA. Accordingly, we respectfully request that the language in the rule cited above be struck from the final version, with the expectation that the Department will be addressing this matter with further legislation. (3)

Response. Chapter 342 establishes a fee structure. It is not adopted pursuant to the NRPA and does not interpret the NRPA. The text in Chapter 342 does not affect NRPA permitting requirements.
