



Commonwealth of Massachusetts  
OFFICE FOR COMMONWEALTH  
DEVELOPMENT

Mitt Romney, Governor ♦ Kerry Healey, Lt. Governor ♦ Andrew Gottlieb, Chief

January 3, 2007

The Honorable Pamela Resor, Chairwoman  
The Honorable Frank Smizik, Chairman  
Joint Committee on Natural Resources and the Environment  
State House  
Boston, MA 02133

Dear Chairwoman Resor and Chairman Smizik:

Pursuant to Chapter 139 of the Acts of 2006, the Blue Ribbon Panel reviewing the efficacy of the Department of Environmental Protection's (MassDEP) guidance policy for implementing the Water Management Act has completed and filed its report. As the statutory convener of the Panel, I am writing to offer my comments on the work of the panel and to convey my personal assessment about the basis for the ongoing conflict about the water management in Massachusetts. It is clear to me at the conclusion of the Blue Ribbon Panel that the issues at contest are no less contentious than before the Panel began to meet and that the issues will re-emerge in the Legislature in the next session.

Many participants in the Water Management Act process forget 2 critical components of the Act.

The first is the statutory and regulatory prohibition against MassDEP issuing permits for water withdrawals that exceed Safe Yield of the water source. The prohibition on new permits is a very blunt instrument that MassDEP has been loath to use for fairly obvious reasons. While some complain that the current policy has an alleged dampening effect on new development, the real concern ought to be how to accommodate new withdrawals without violating the Safe Yield standard. MassDEP has developed its policy to enable it to continue to permit new withdrawals through the use of offsets as an alternative to the statutory limits on new withdrawals. It is ironic to me that the development of a flexible policy that enables new withdrawals while providing a path to restoration of the resource has subjected MassDEP to such harsh criticism.

The other important point is that the Act requires MassDEP to make decisions about water availability after taking into consideration environmental and economic factors, using its agency expertise and discretion. The Legislature, in its wisdom in 1985, chose not to give the environment or development the trump card. In doing so, the Legislature recognized the complexity of water resources management and the important, but not fully determinative, role that water supply withdrawals play in maintaining healthy water resources. The truth is that natural water systems, like climate systems or the human body, are linked and affected by numerous other forces. Regulating water withdrawals to achieve specific outcomes in a given river is complicated by a number of other forces, some natural and some manmade. The lack of certainty and precision inherent to this endeavor can either be allowed to become an impediment to requiring water use efficiency and implementation of 21st century management or it can become an ongoing excuse for inaction disguised as a commitment to finding the "right" answer. Again, by looking to find the right place to balance, MassDEP has opened itself to criticism by creating achievable performance standards to conserve water resources and thus avoid the potential of permit denials and limits that would truly dampen development opportunities.

Stripped to their bare essentials, the arguments I heard over 3 months of meetings came down to nothing more than a dispute over the willingness of the parties to make water suppliers accountable for the water use practices in their communities. There was a lot of talk about process and legality that reflected hard felt feeling about the development and release of the MassDEP Water Management Policy, but those issues were hooks and were not the real issues at odds. It is my view that the MassDEP policy was legally issued, that the use of policy and guidance is an appropriate and time-tested tool and that the issue no longer warrants serious political consideration. Many concerns of the water supply communities were addressed adequately by MassDEP in 2006. The one that was not is the very existence of the policy and the values it reflects. This cannot be addressed if MassDEP is to fulfill its obligations under the Act.

It is my view that while the Massachusetts Municipal Association and the Massachusetts Waterworks Association have many of the same interests in this discussion, their interests are not totally aligned. There are many municipalities whose political leaders, administrators and water managers have done a good job improving their water systems and reducing per capita use. These water suppliers and communities would benefit from implementation of a modified water policy and release of pending permits. The debate, as is often the case, seemed geared toward protecting those suppliers who face challenges in achieving reasonable performance standards. While some subset of these suppliers and communities do warrant special consideration, the debate seems to be a race to the bottom. The hard truth that Massachusetts Waterworks can't seem to get past is that there are performance levels that are simply unacceptable and warrant MassDEP's direct attention and enforcement powers.

The MassDEP guidance policy has it basically right. Permittees have reasonable time periods for implementing their permits. Those that achieve performance standards are minimally affected by the permits. Communities that make progress but fail to achieve the standards are required to develop a plan for progress and are given the benefit of enforcement forbearance. It is only those communities whose performance is poor and who fail to make reasonable efforts that face the prospect of imminent enforcement. Is that not the way it ought to be?

I would favor a move away from the requiring of a gallon for gallon offset of permitted withdrawals in exchange for a system predicated on the implementation of Best Management Practices. I see a BMP approach as one that furthers the implementation of management practices that ought to be undertaken in every community without the added complication of tracking and accounting for specific offsets. Development of this approach is something that MassDEP ought to consider including in some permits on a pilot basis.

The only change to the 65 Gallons Per Capita per Day and 10% Unaccounted for Water standards that I would consider would be to apply them uniformly across the state. I see no rationale for certain parts of the state to be less water efficient than others.

While regretful that the Blue Ribbon Panel did not achieve a consensus recommendation, I have a much greater appreciation for the views of the water supply community. I have come to realize that there are many different views and interests within the water supply industry. The water suppliers at the leading edge of water management and efficiency would benefit greatly from the implementation of a broad regulatory scheme that solves stormwater and wastewater management problems. All water managers would benefit from more water staying in the ground near its source of origin. The water supply community would be the biggest beneficiary of the water being better managed and returned near its source because that would provide the additional water they so desperately seek. Rather than continue to rehash the policy, I would encourage the discussion to be around how to structure and finance meaningful improvements to the way Massachusetts manages its water resources.

Outdoor water use limitations are at the core of this dispute. Achieving the standards in communities with any meaningful lawn space almost always requires some limitations on lawn watering. The water suppliers, for a variety of reasons some logistical and some revenue based, do not want to be in the business of limiting outdoor water use. Much of the conflict would dissipate if someone other than the water departments was responsible for enforcing outdoor water restrictions and if the communities meeting water

use performance standards were compensated for decreased revenues. Were these things to happen, just about all the noise about legality, process and science would fade to the background. Recognition of these facts ought to put the issues in perspective and channel the discussion to a more productive place. Success can be achieved, but only after the parties realize that bettering their situation can only come through collaboration and the recognition of common interests. Neither the environmentalists nor the water suppliers have sufficient leverage to radically change the system to their perceived advantage. Their choice is to continue to fight to stalemate or to work together on the changes in law and funding necessary to achieve a better outcome.

I respectfully recommend that the Legislature focus its efforts on developing funding mechanisms to assist communities with the costs associated with improved water resources management. Much of the vitriol surrounding the Water Management Act would be diminished if funding became available. My other recommendation is that the Legislature refrain from the temptation to intervene in MassDEP's implementation of its guidance policy. Case law has and will continue to winnow down the issues that truly warrant legal interpretation. It is worth noting that to date judicial review of permits has strongly sided with MassDEP.

Thank you for your consideration of my personal thoughts and the opportunity to have worked on this and many other issues with you over the years.

Sincerely,

Andrew Gottlieb, Chief  
Office for Commonwealth Development