



Charles River Watershed Association

December 15, 2006

Steven McCurdy
Office of Commonwealth Development
100 Cambridge Street
Boston, MA 02114

Re: Blue Ribbon Panel and the Requirement of Safe Yield

Dear Mr. McCurdy:

I am writing to you in your role as chair of the blue ribbon panel charged with reporting to the legislature on the effectiveness of the Department of Environmental Protection's (DEP) Water Management Act guidance (guidance) on behalf of the Charles River Watershed Association (CRWA) and the undersigned environmental organizations concerned with the serious degradation that is occurring to the state's water resources. Water suppliers have asserted at a number of panel meetings that the conservation-oriented permit conditions prescribed in the guidance do not achieve the balance among competing uses required under the Water Management Act and its regulations. We believe it is important to respond and also to discuss the legal requirement of "safe yield," a discussion of which has been glaringly absent from the panel's discussions.

Safe yield is a cornerstone of the Water Management Act (WMA). It is critical to efforts to ensure the long-term sustainability of the state's water resources. In the 2004 WMA policy, DEP notes that the concept of safe yield is the principal basis for controlling withdrawals permitted under the WMA. Safe yield is "the volume of water that can be removed from surface and groundwater without unreasonable damage to the water resource." *Id.*

Administrative Magistrate James P. Rooney, who to date has heard five of the Ipswich basin permit administrative appeals under the WMA and issued four lengthy and detailed decisions upholding the conservation conditions, wrote: "Safe yield plays an important role in the process by which DEP permits withdrawals under the Water Management Regulations. The Regulations are replete with references to DEP's obligation to ensure that the withdrawals from a water source do not exceed the safe yield of that source."

DEP Commissioner Robert Golledge, affirmed the Magistrate's Recommended Final Decision in appeals by the Towns of Wenham, Topsfield and Hamilton, explaining in his Final Decision, dated March 31, 2006¹ that the WMA

establishes safe yield as the maximum amount of water that may be withdrawn under registrations and permits, which assumes some reserved amount to ensure the security of the withdrawal volumes and to preserve the resource itself. A safe yield determination normally precedes the permit proceedings; the "balancing" of factors taken into account in the issuance of permits is not part of determining safe yield."

(Emphasis added). The Commissioner also found that DEP "appropriately looks first to conservation as a means to restore safe yield . . ."²

These statements by the Commissioner make it crystal clear that balancing is not part of determining the quantitative finite amount of water that can be withdrawn from a water source (generally considered by DEP to be a watershed) while still protecting the water resource itself. The plain language of the regulations at 310 CMR 36.02 provides that "The purpose of the permit program is to assist the Department in the comprehensive management of the Commonwealth's water resources within its river basins in a manner which ensures an appropriate balance among competing water withdrawals and uses, as well as preservation of the water resource itself. (Emphasis added). Indeed, Duane LeVangie, head of the DEP's Water Management Program, testified in all of the Ipswich basin WMA adjudicatory hearings that under 310 CMR 36.02, preservation of the water resource is not part of the balancing that DEP engages in; rather, preservation of the water resource is the "the bottom line," or key parameter. It is a basic tenet of administrative procedure that an agency's own interpretation of its regulations will be given substantial deference.

The Massachusetts Water Works Association (MWWA), despite clear science to the contrary by the United States Geological Survey, continues to insist that DEP's policy "will be ineffective at its stated purpose of assuring future sources of water supply and maintaining or improving streamflow." MWWA November 29, 2006. It therefore reasons that conservation measures designed to reduce nonessential outdoor water use in the summer when streamflows are low should not be imposed. The opposition of some suppliers to the imposition of reasonable conservation measures in their withdrawal permits is at odds with the 2006 Massachusetts Water Conservation Standards, the Interbasin Transfer Act Performance Standards and EOEA's 2004 Massachusetts Water Policy Task Force Report, as well as the WMA Policy and Guidance Document.

DEP has the authority and the legal obligation under the WMA to ensure that withdrawals do not exceed the safe yield of a basin and that competing instream uses like fisheries, habitat, and recreation are reasonably protected. DEP recognizes this and has testified

¹ The fourth, an appeal by Lynnfield Center Water District, is awaiting Final Decision by the Commissioner.

² At the October 20, 2006 blue ribbon panel meeting information was presented that conservation measures were far and away the least expensive method for improving streamflow as compared to wastewater and stormwater recharge and removal of inflow and infiltration.

in the Ipswich appeals that, in the past, the scales have tipped very far to favor the water supply side to the detriment of competing instream uses.

The WMA Policy is a first, but critical, step by DEP toward beginning to balance those competing uses, rather than simply allowing water supply to trump all other uses. DEP's 2006 guidance gives suppliers a generous amount of time to comply with the new conservation requirements and enforcement forbearance provided they are making reasonable progress toward achieving the standards.

The report should explicitly recognize the statutory requirement of safe yield and discuss DEP's WMA Policy and guidance in the context of it. The DEP is charged with "managing ground and surface water in the commonwealth as a single hydrological system" in the WMA and safe yield is integral to the health and ecological integrity of our watersheds.

Sincerely,



Margaret Van Deusen, Deputy Director and General Counsel
Charles River Watershed Association

And on behalf of:

Gary Clayton, Vice President for Programs
MassAudobon

Ian Cooke, Executive Director
Neponset River Watershed Association

Kirt Mayland, Director of the Eastern Water Project
Trout Unlimited

Carol Lee Rawn
Conservation Law Foundation

Mettie Whipple, Executive Director
Eel River Watershed Association

Nancy Goodman, Vice-President for Policy
Environmental League of Massachusetts

Deirdre Menoyo
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Kerry Mackin, Executive Director
Ipswich River Watershed Association

Pine duBois, Executive Director
Jones River Watershed Association

Samantha Woods, Executive Director
North and South Rivers Watershed Association

Forsyth Kineon, Executive Director
Organization for the Assabet River

Donald H. Bade, President
Parker River Clean Water Association

Lee Steppacher, Project Coordinator
Sudbury, Assabet and Concord Wild and
Scenic River
National Park Service

Eileen Simonson
Co-Executive Director
Water Supply Citizens Advisory Committee

Paul Lauenstein

cc: Arleen O'Donnell
Mary Griffin