



Via Certified Mail

June 9, 2014

MassDEP Northeast Regional Office
205B Lowell Street
Wilmington, Massachusetts 01887
Attn: Wetlands Program

Re: Request for Superseding Order of Conditions, Daly Field, 1 Nonantum Rd., Newton, MA, DEP File #239-698

Dear Sir or Madam:

On behalf of the Charles River Watershed Association, Inc. (CRWA) and ten residents of the City of Newton (Newton), I am writing to request that MassDEP review the Newton Conservation Commission's Order of Conditions (OOC) and issue a Superseding Order of Conditions (SOC) in the above-referenced matter. I am enclosing a copy of the Fee Transmittal Form and check. A copy of the OOC, which was issued on May 27, 2014, is attached hereto as Exhibit A.

I. The Newton Residents requesting a Superseding Order of Conditions, see 310 CMR 10.05(7)(a)5 and (b), are:

- a) Suzanne Carleo, 146 Woodward Street, Newton, MA 02461
- b) Jonathan Katz, 16 Cross St, West Newton, MA 02465
- c) Norah Wylie, 16 Cross St, West Newton, MA 02465
- d) Norman A. Sieman, 100 Clearwater Rd., Newton Lower Falls, MA 02462
- e) Ellen Parker, 215 Franklin St., Newton, MA 02458
- f) Eugenia Marcus, 1555 Commonwealth Ave., West Newton, MA 02465
- g) Mark Fagan, 64 Erie Ave, Newton Highlands, MA 02461
- h) Thomas L. Schwarz, 38 Garland Rd, Newton, MA 02459
- i) Sarah Luria, 38 Garland Rd., Newton, MA 02459
- j) John D. Leith, 162 Islington Rd, Auburndale, MA 02466

II. CRWA is an aggrieved person:

CRWA is a non-profit environmental organization incorporated in Massachusetts in 1965 with a principal place of business at 190 Park Road, Weston, MA. The charitable purpose for which CRWA was formed is to protect the health of the Charles River and its watershed. CRWA is dedicated to protecting and improving water quality and quantity, fish and wildlife habitat, river access and the scenic values of the Charles and its watershed.

CRWA has a long history of involvement in issues relating to water quality in the Charles. CRWA expends funds, time, and staff resources: a) monitoring the condition of the river and tributaries, taking measurements of water depth and streamflow, dissolved oxygen, temperature and sampling for pollution on a monthly basis, and conducting additional specialized sampling; b) analyzing water quality and water quantity data; c) studying the causes of low streamflows and pollution in the Charles, d) by developing practical solutions for protecting and restoring watershed health; e) assisting governmental agencies in developing Total Maximum Daily Loads (TMDLs) for the Charles, assessing the river's fish community and restoring American shad to the Charles; f) developing and disseminating educational materials and programming about the Charles River, its values, the threats to it and actions necessary to protect it; and f) providing technical assistance and consultation to watershed municipalities, state and local agencies, and businesses.

Polluted stormwater runoff from impervious surfaces discharging into the Charles River is the major problem affecting the health of the river today. In addition to helping to develop the Nutrient TMDLs for the Charles (2007, 2011), CRWA works to ensure that these TMDLs are being met in the watershed; this is directly related to CRWA's purposes.

CRWA's nearly 5,000 members are concerned about the welfare of the Charles River, its natural resources and its contributing watershed. Its members value the river's water quality and quantity, fisheries, wildlife, avian, wetland and aquatic habitat, and its natural resources, in addition to its recreational opportunities and scenic values. Its members include individuals and families, who are fishermen, boaters, artists, scientists, and educators, and businesses. CRWA's members use the river, its tributaries and banks, for fishing, canoeing, kayaking, hiking, bird watching, photography, passive recreation and education. Members' concern about the river's water quality is attested to by the 80 volunteers that participate in CRWA's monthly water quality monitoring program.

CRWA is an aggrieved person because the work authorized under the OOC, specifically storm water management, will fail to achieve the phosphorus reductions necessary to comply with the Charles River Lower Basin Nutrient TMDL (Nutrient TMDL). This failure will harm the river and the interests protected under the Wetlands Protection Act, G.L. c. 131, § 40 (the Act), and the regulations at 310 CMR 10.00 *et seq.* (regulations). The use and enjoyment of the river and its resources by its members will be significantly impaired by the work approved in the OOC and they will suffer great harm to their conservational interests. Additionally, the work as approved in the OOC prevents CRWA from achieving its organizational purpose. CRWA representatives attended the hearing and submitted written comments to the Conservation Commission.

III. Superseding Order of Conditions

The Newton Conservation Commission (Commission) found that the proposed work is significant to the following interests identified in the Act: public water supply, prevention of

pollution, private water supply, fisheries, protection of wildlife habitat, groundwater supply, storm damage prevention and flood control.

MassDEP should issue a superseding order requiring the applicant to meet the nutrient TMDL for stormwater runoff from the entire project area, including the Daly Rink parking lot. The applicant has acknowledged the use of the parking lot will change as a result of the construction of the facilities at Daly Field (see, *e.g.* the Project's Single and Final Environmental Impact Reports) and has entered into a Memorandum of Agreement spelling out shared uses and responsibilities with respect to the parking lot with multiple parties.

The applicant failed to demonstrate that it will meet the TMDL in the shared parking area located between the field and the Daly Rink, or that the stormwater management proposed complies with the Act and its regulations. In addition, following identification by CRWA of an error in the calculations, the applicant presented technical modifications to the design of the stormwater management system at the final meeting of the hearing for this project, and the hearing was closed the same evening, without allowing for additional time to review the proposed changes. The proposed work as approved by the Commission violates the Act and its regulations because:

1. The approved stormwater management does not meet Massachusetts Stormwater Standard 4 and is not consistent with the Nutrient TMDL. 310 CMR 5.05(6)(k)4.a.-c. and (k)7; Massachusetts Stormwater Handbook, Volume 1, Chapter 1, p. 10, Chapter 2, p. 15.
2. The approved work fails to reduce the discharge of pollutants to the maximum extent practicable. 310 CMR 10.05(6)(q);
3. The applicant failed to demonstrate that it is meeting the Massachusetts Stormwater Standards to the maximum extent practicable, or that it is implementing the "highest practicable level of stormwater management." 310 CMR 10.05(6)(b), (k),(o);
4. The approved work will violate anti-degradation provisions of the MA Surface Water Quality Standards. 310 CMR 10.05(6)(q); 314 CMR 4.04;
5. The applicant did not adequately describe the effect of the work on the interests identified in the Act. 310 CMR 10.05(6)(c).
6. The applicant has failed to submit a long-term pollution prevention plan that demonstrates how the project will comply with the nutrient TMDL. 310 CMR 5.05(6)(k)4. and 7; Stormwater Handbook.

IV. Discussion

Polluted stormwater runoff is the leading cause of water quality impairments in the Charles River. This segment of the Charles where the discharge will occur is listed as impaired under section 303(d) of the federal Clean Water Act, for among other impairments: Chlorophyll-a, Escherichia coli, Nutrient/Eutrophication Biological Indicators, dissolved oxygen and Phosphorus (total). Since 2006, there have been frequent toxic blue green algae blooms in the lower basin (cyanobacteria). A major cause of these blooms is high phosphorus concentrations. Cyanobacteria poses a risk to public health and the environment, and in the Lower Basin significantly impairs, and for certain users even eliminates, recreation, an existing use. The blue-green algae bloom in the Charles River is a clear indication that nutrient loads in the Charles are harming the river. The proposed discharge will contribute to an instream exceedance of water quality standards and outbreaks of toxic blue-green algae.

In urban environments, all impervious surfaces carry high volumes of stormwater runoff and generate significant loads of major stormwater-related pollutants, including phosphorus. Parking lots are contributing sources of phosphorus-laden runoff.

Recognizing that parking is integral to this project, MassDEP in its March 7, 2014 comment on the Final Environmental Impact Report (Exhibit B attached hereto):

request[ed] that the proponent give more thoughtful consideration to controlling stormwater runoff from the adjacent parking areas, which will be utilized by the tenants of Daly Field . . . It is unclear why the stormwater management plans do not include low impact development measures for the parking lot adjacent to the site that will be utilized by Daly Field patrons.

“Although the need for stormwater controls for the Daly Rink parking lot to control the release of pollutants causing impairments to the Charles River, consistent with the total maximum daily load (TMDL) was acknowledged by the Secretary of Energy and Environmental Affairs, MassDEP and the Charles River Watershed Association, the FEIR reports that only a level spreader or crushed stone trench would be installed.” *Id.*

As Secretary Sullivan recognized, the proposed project relies on this [Daly Rink] parking area to meet a portion of the project’s parking demand. Mitigation of existing sheet flow runoff from this parking area would provide a meaningful benefit to the Charles River, provide effective stormwater management and support compliance with the TMDL for the Charles River.” FEIR Certificate at 10. Among the issues for resolution that the Secretary directed be incorporated in Final Section 61 Findings is: “Mitigation of stormwater runoff from the Daly Rink parking lot.”

Id. at 19. The parking lot work proposed by the applicant falls far short of the 62 percent reduction necessary to meet the Nutrient TMDL.¹

As set forth in the Massachusetts Stormwater Handbook, Volume 1, Chapter 2, p. 13,

If a proponent is proposing a project that is in the watershed of a water body with a TMDL, and if the project is subject to wetlands jurisdiction, the proponent must select structural BMPs that are consistent with the TMDL. Because pollution prevention is an interest identified in the Wetlands Protection Act, conservation commissions and MassDEP may require use of such BMPs when reviewing projects subject to jurisdiction under the Act.

With respect to Stormwater Standard 4, MassDEP explains that “[i]f there is a Total Maximum Daily Load (TMDL) that indicates stormwater BMPs are needed to reduce the concentration in stormwater runoff of pollutants other than TSS such as nitrogen and *phosphorus*, the BMPs selected must be consistent with the TMDL. See Volume 1, Chapter 2.” Massachusetts Stormwater Handbook, Volume 1, Chapter 1, p. 10 (emphasis added). The approved work is not consistent with the Nutrient TMDL.

DCR is also subject to the MS4 General Permit requirements. The wetland regulations at 310 CMR 10.05(6)(q) provide that “[c]ompliance with the Stormwater Management Standards set forth in 310 CMR 10.05(6)(k) through (q) does not relieve a discharger of the obligation to comply with . . . the NPDES General Permit for Small Municipal Separate Storm Sewer Systems.” DCR is subject to Parts IV and V of the general permit, as well as the general requirements of Part I and the state’s section 401 water quality certification in Part IX. Pursuant to Parts IV A and V A., “the permittee must develop, implement and enforce a program to reduce the discharge of pollutants from the MS4 to the maximum extent practicable; protect water quality, and satisfy the water quality requirements of the Clean Water Act and state water quality standards. Under Part IX, the permittee must comply with the surface water quality standards, the Wetlands Protection Act and its regulations and the stormwater management policy. Rivers are priority resource areas for consideration in a stormwater management program. General Permit, Part IX D. The language in Part I B. (k) and (l), Part I C. and D make it clear that the permittee must meet applicable TMDLs.²

¹ The applicant also agreed at the Conservation Commission hearing to install a low berm to direct runoff into a vegetative swale and to make improvements to the level spreader; however, the applicant acknowledged at the hearing that this would not be sufficient to bring the parking lot into compliance with state stormwater standards including the TMDL. No design details or stormwater calculations have been provided for this stormwater system.

² Pursuant to the general permit Part I D.3., “[t]he permittee’s assessment of whether the WLA is being met is expected to focus on the adequacy of the permittee’s storm water controls (implementation and maintenance), not on the response of the receiving water.”

The project area, including the shared parking lot on the Daly Rink side, should be required to meet the Nutrient TMDL. As part of a Superceding Order of Conditions for this project, MassDEP should require the applicant to do so.

Sincerely,

Margaret Van Deusen
Deputy Director and General Counsel

Enc.

cc: (Via certified mail):
Jennifer Steel, Newton Conservation Commission
Janet Fishstein

(Via regular mail):
Jack Murray
Bethany Card, MassDEP
Joe Orfant, DCR