

October 25, 2019

Via Email

Lealdon Langley, Director
Division of Watershed Planning & Permitting
Department of Environmental Protection
1 Winter Street, 5th floor
Boston, MA 02108
dep.talks@mass.gov

Re: RGP Broadstone Watch City, Waltham

Dear Mr. Langley:

Charles River Watershed Association (CRWA) submits the following comments on Massachusetts Department of Environmental Protection's (MassDEP) "Tentative Determination to Issue Antidegradation Authorization to Discharge to an Outstanding Resource Water" for the Broadstone Watch City project in Waltham. We understand that in general, there is community support for this project, and these comments do not relate to the overall redevelopment of this site. However, based on current information, we strongly oppose the proposed contaminated site dewatering discharge to an Outstanding Resource Water and offer the following comments on MassDEP's proposed antidegradation authorization.

The applicant plans to build a 6-story, 54,000 square foot residential building and is seeking authorization for construction-related dewatering discharge to the Stony Brook Reservoir and its tributaries, which are protected as Outstanding Resource Waters and Class A Public Water Supply. According to the applicant, the site was historically used as a garage/repair shop and aluminum product warehousing/distribution center, and the contaminants that are known or believed present at the site include inorganics, halogenated and non-halogenated volatile organic compounds (VOCs) and semi-VOCs, and fuels. The proposed discharge of treated groundwater would last up to 18 months and be at a rate of up to 400 gallons per minute (0.576 million gallons per day). Given the high level of protection afforded to Outstanding Resource Waters, in order to seek authorization from the Environmental Protection Agency for coverage under the Remediation General Permit pursuant to the Clean Water Act, the applicant must first obtain an antidegradation authorization from MassDEP pursuant to the Massachusetts Surface Water Quality Standards.

As one of the country's oldest watershed organizations, CRWA's mission is to protect, preserve, and enhance the Charles River and its watershed through science, advocacy, and the law. Our initiatives over the last five decades have dramatically improved the quality of water in the watershed and fundamentally changed approaches to water resource management. Protection of Outstanding Resource Waters, which include Class A Public Water Supplies and their tributaries, certain wetlands, and other waters that have outstanding socio-economic, recreational, ecological and/or aesthetic values, is critical to the overall ecological health of our watershed.

MassDEP cannot issue an antidegradation authorization without determining that the discharge is for the express purpose and intent of maintaining or enhancing the resource for its designated use.

Under the antidegradation provisions of MassDEP’s Surface Water Quality Standards, “the quality of [Outstanding Resource Waters] *shall* be protected and maintained.” 314 CMR 4.04(3) (emphasis added). Accordingly, the regulations prohibit a new or increased discharge to an Outstanding Resource Water unless “the discharge is determined by the Department to be for the express purpose and intent of maintaining or enhancing the resource for its designated use **and** an authorization is granted as provided in 314 CMR 4.04(5).”¹ 314 CMR 4.04(3)(b)1. (emphasis added).

The applicant ignored the first part of the required determination and only attempted to demonstrate that it meets the requirements of section 4.04(5). However, the criteria under section 4.04(5) are *only* relevant if the discharge has first been determined “to be for the express purpose and intent of maintaining or enhancing the resource for its designated use.” 314 CMR 4.04(3)(b)1.² The Antidegradation Implementation Procedures provide examples of discharges that could qualify as being for the purpose of maintaining or enhancing a resource for its designated use: “discharges necessary to maintain a public water supply, such as a public supply treatment plant effluent; chemical application to a waterbody necessary to control weeds or algae to maintain designated uses; and discharges necessary to provide access to or maintain these areas (e.g. runoff from roads, parking lots or park buildings, or from reservoir maintenance activities).”

The applicant has not explained how the discharge is for the express purpose and intent of maintaining or enhancing the Stony Brook Reservoir and its tributaries for their designated use as a Public Water Supply, and MassDEP has made no such determination here. In fact, the discharge of contaminated site dewatering effluent would seem to directly conflict with maintaining or enhancing these waters for their designated use. Without making a determination that the express purpose and intent of this discharge is maintaining or enhancing these waters for their designated use, MassDEP cannot issue an antidegradation authorization.

¹ The regulations also provide certain exceptions for the discharge of dredged or fill material under section 4.04(3)(b)2., which are not relevant here.

² See also MassDEP, *Implementation Procedures for the Antidegradation Provisions of the Massachusetts Surface Water Quality Standards, 314 CMR 4.00* (“Antidegradation Implementation Procedures”) (Oct. 21, 2009) (“New or increased discharges to ORWs [] may be allowed **only where both** the discharge is ‘determined by the Department to be for the express purpose and intent of maintaining or enhancing the resource for its designated use’ and an authorization is granted pursuant to 314 CMR 4.04(5).”) (emphasis added); (“Following the Department’s determination, made in agreement with the appropriate entity, that a new or increased discharge to an ORW is for the express purpose of enhancing or maintaining the water for its designated use, the authorization process of 314 CMR 4.04(5) proceeds . . .”). These Antidegradation Implementation Procedures apply to point source discharges subject to 314 CMR 4.00. See 314 CMR 4.04(6).

This discharge is ineligible for coverage under the RGP because MassDEP has not made, and likely cannot make, the necessary determination for an antidegradation authorization.

Under the Remediation General Permit (RGP), discharges to Outstanding Resource Waters in Massachusetts are ineligible for coverage “unless an authorization is granted by [MassDEP] by 314 CMR 4.04(3)(b).” National Pollutant Discharge Elimination System (NPDES) General Permit for Remediation Activity Discharges, Permit No. MAG910000, Part 1.3 Limitations on Coverage (2017). As discussed above, MassDEP has not made, and likely cannot make, the necessary determination for antidegradation authorization under 314 CMR 4.04(3)(b) that the dewatering discharge would be for the express purpose and intent of maintaining or enhancing the Stony Brook Reservoir and its tributaries for their designated use as a Public Water Supply. The discharge is therefore ineligible for coverage under the RGP.

Even if MassDEP could properly issue an antidegradation authorization and the discharge was eligible for coverage under the RGP, the applicant has not met its high burden under section 4.04(5)(b) of the regulations.

Under 314 CMR 4.04(5)(b), before MassDEP may issue an authorization to discharge to Outstanding Resource Waters, an applicant must demonstrate that:

no less environmentally damaging alternative site for the activity, receptor for the disposal, or method of elimination of the discharge is reasonably available or feasible; to the maximum extent feasible, the discharge and activity are designed and conducted to minimize adverse impacts on water quality, including implementation of source reduction practices; and the discharge will not impair existing water uses and will not result in a level of water quality less than that specified for the Class.

The applicant’s assertions that there are no less damaging alternatives and that water quality will be protected because the discharge will be subject to an NPDES permit (the RGP) are broad and unsubstantiated. CRWA strongly objects to this finding, based on the limited details provided about the project. It does not appear that the applicant considered any alternatives for construction of the project that might mitigate dewatering flows, such as limiting basement depth or accelerating foundation construction to shorten the duration of the discharge. Without that information, it is impossible to conclude that there are no less damaging alternatives or that the adverse impacts on water quality have been minimized to the maximum extent feasible. More information is also needed about why the entire volume of dewatering discharge could not go to the Waltham Municipal Separate Storm Sewer System.

Also, because the RGP does not contain specific antidegradation requirements, it appears that the limits imposed on the discharge by the RGP would be based only on achieving Massachusetts Surface Water Quality Criteria. For some pollutants like iron, lead, and ammonia, this will result in a significant increase in the downstream concentration of these pollutants, which is particularly problematic for a Public Water Supply. There would also be an increase in receiving water concentration for other pollutants, including nickel, arsenic, and copper. At the present time, CRWA is not aware of any information indicating that the quality of these waters will be protected and maintained if the proposed project moves forward. This outcome does not comport with the

high level of protection afforded to Outstanding Resource Waters in Massachusetts's antidegradation provisions.

MassDEP should deny the applicant's request for an antidegradation authorization to discharge to an Outstanding Resource Water. The applicant has not met its high burden of showing that such a discharge should be allowed, and MassDEP has not complied with its own regulatory requirements in reaching its tentative determination. A final decision to authorize this discharge would not only be unlawful, it would contravene MassDEP's imperative duty to protect Outstanding Resource Waters and Public Water Supplies.

Sincerely,



Heather Miller, Esq.
General Counsel & Policy Director

cc: Sam Corda, Managing Director, Cambridge Water Department