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PUBLIC HEALTH COMMITTEE HEARING, MARCH 12, 2010

TESTIMONY ON HB 5477, AAC THE CLEAN WATER ACT AND STREAM FLOW REGULATIONS

Dear Senator Harris, Representative Ritter, and Members of the Committee:

Rivers Alliance of Connecticut is the statewide, non-profit coalition of river organizations, individuals, and businesses formed to protect and enhance Connecticut's waters by promoting sound water policies, uniting and strengthening the state's many river groups, and educating the public about the importance of water stewardship.

HB 5477 seeks to amend the process of implementing stream flow regulations. It is an unusual vote of no-confidence in the existing process for adoption of regulations. The Department of Environmental Protection (DEP), which is charged with responsibility for flow protection, only recently ended its public hearing on a proposed flow regulation that has been five-years in the making. DEP has yet to issue its response to the more than 400 comments it has received. At some later point, a proposed regulation will be sent to the Regulations Review Committee. Meanwhile, HB 5477 would guarantee that no matter how the process worked out, implementation of the regulation could not go forward without a new, complicated, and costly review process.

Rivers Alliance has been intensely involved in state efforts to do water management planning and flow protection. Rivers Alliance staff and directors have participated in almost all the stakeholder committees at the Water Planning Council; we were key members of the stakeholder group that worked on PA 05-142, the statute that mandated flow protections; we served on the stakeholder committees formed at the DEP to work on the regulation; we currently serve as co-chair of the Water Planning Council Advisory Group.

With this experience, we offer a few comments.

For the past ten years, water consumption has been dropping, and the last two summers were rainy, with water use plummeting. The general picture for water companies is not a lack of water but a lack of sales. Thus, for example, The South Central Regional Water Authority had to let people go last year. The Torrington

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Water Company, which is very reluctant to allocate water for the environment, is seeking out new customers, in part by persuading people to go off private wells and on to public water. And the water industry generally is taking a much more serious look at altering its business model and rate structures for long-term sustainability. (See the 2009 Aspen Institute report *Sustainable Water Systems: Step One -- Redefining the Nation's Infrastructure Challenge*, to include the watershed and natural environment.)

In Connecticut, we get some 48 inches of water per year. We do not have a water-availability problem, we have a water management problem. Healthy rivers and aquifers are the resource infrastructure of the water supply business.

The purpose of the flow regulation is to save and maintain the resource infrastructure. HB 5477 would move us in the wrong directions

The first step proposed in this bill is a study of all basins in the state. Unfortunately, the possibility of developing a statewide picture of our water budget (the Holy Grail of water planning) has never been more remote. The Water Planning Council and its member agencies have abandoned this longstanding goal for lack of resources (staff and money). The Connecticut Institute of Water Resources has done some work on a method for basin analysis, but I do not think it is ready for application on this scale, nor is it the only analytic method. (It's not clear why the legislation specifies using a CIWR method.)

The only entity forging ahead at least to some extent is DEP in connection with protecting flows.

Another barrier to a comprehensive study at this time is that the Department of Public Health (DPH) is keeping secret almost all information relating to public water supply on the grounds that release of such information would imperil safety and security. For example, many of us working on water resources have noted for years that it would be helpful to have a single database for identified future sources of water supply. In fact, the availability of new sources is an issue this bill takes up. This year the Water Planning Council announced in its report to the legislature that DPH had compiled such a list (not including high-quality waters identified by the DEP). I requested the list on December 13, 2009. DPH is still processing the request, but has indicated that I am not likely to receive anything more than the usual heavily redacted text with the names of all reservoirs blacked out. The materials might come in months or never.

DPH has even turned down a request from the US Geological Survey, which is actually working on a regional analysis that would be helpful in finding the answers to your questions. After discussions, USGS got only part of what it wanted.

So at this time, not only is there no money work with, there's not much information either (at least that the public can see). Rivers Alliance is proposing changes in the

Freedom of Information Law to restore public and scholarly access to non-security information. This is an essential step in developing a water-use model.

The schedule that the bill proposes for the study and analysis of the water data is highly optimistic. DEP is notoriously stretched. DPH is presently behind schedule on revising its own regulations, on reporting to the legislature on the \$200,000 pilot project based in Groton, and on writing regulations for packaged sewage treatment systems. Based on recent agency performance in meeting legislative deadlines, the studies to be done by DEP and DPH would run at least four to five times longer than the bill mandates.

The last stage envisioned by this bill would be a Department of Public Utility Control (DPUC) docket, which would essentially restart the process of figuring out if water companies have water to spare. It would also take up the issue of reforming the rate structure of companies, so as to attain revenue stability and business sustainability. This is an excellent idea that is already under way. The private companies and the regionals are likely to continue to be the leaders. We strongly support the effort.

The municipal companies pose a much more intractable problem. These are not regulated by the DPUC. The water utility manager has to make do with what the municipal government can spare. Some municipal utilities have serious problems with infrastructure and waste. If this section of the bill is intended to oblige ALL utilities to set rates so as to support good management practices, that might very well be a change for the better.

Looking Ahead

We would be delighted to work with the Committee toward a statewide water use plan. But it would be prudent to keep in mind that all efforts to develop such a plan have failed. The flow regulation appears to provide the impetus for serious thinking about how we handle our most valuable public trust resource: water. Take away the impetus, and you halt progress.

Wastewater Provisions in HB 5477

The first part of HB 5477 limits the maintenance and monitoring requirements that the Department of Public Health (DPH) and the local health districts can put on sewage-treatment systems of less than 5,000 gallons per day discharging to the ground.

This would appear to cover both traditional systems and the small packaged sewage treatment systems, which have been the subject of high-profile litigation and various legislative efforts. They are sometimes called Advanced Treatment Systems or ATS.

ATS have been outlawed in drinking-water watersheds (Public Act 02-129). Elsewhere, they are permitted by the Department of Environmental Protection (DEP), although DEP has not written regulations for them. In Special Act 06-9 the legislature authorized DPH to take over responsibility for the systems under 5,000 gallons per day, but DPH has not written the necessary regulations. Meanwhile, heavy reliance on small ATS is planned in the new Old Saybrook Decentralized Wastewater District. This trend is expected to continue along the Coast and in other areas where sewer service is not wanted.

ATS presently exist in a sort of regulatory limbo. Standards vary. Their performance has been spotty. Enforcement of permits has been weak. The proposal in HB 5477 is that if an owner or operator has a valid discharge permit, the system should not be subject to routine inspections or pump-outs. We strongly recommend that any community that is willing to support inspection and maintenance of septic systems should not be limited at this time. Possibly in the future, Connecticut will have developed an adequately strong regulatory structure for these small systems so that the community can rely on their meeting proper health and environmental standards. That is not the case yet.

**Rivers Alliance Request for Assistance from the Public Health Committee
In the Matter of Secrecy of Water Utility Data**

Proposal to Amend Existing Law to Allow Timely Review
Of Previously Public Water Company Documents
Not Essential to Homeland Security

BACKGROUND

Laws relating to water utilities passed in 2002 and 2003 have combined to remove the right of a member of the public, other than a law enforcement official, to review virtually any aspect of the business of a public water supplier in a timely manner. In large measure, all aspects of water utility operations may now be withheld from public scrutiny. In practice, the law, as interpreted by the Department of Public Health (DPH) does, in fact, block public scrutiny of water companies.

Post-9/11/2001, ongoing efforts by DPH to require water companies to work with local officials and others to protect water supply clashed with efforts by utilities to impose secrecy on all information that might be useful to an enemy intending to damage Connecticut's water supply. DPH has recently emphasized to the Water Planning Council Advisory Group that the secrecy laws were initiated by the water

utilities, not by DPH. Nevertheless, DPH not only has acceded to all confidentiality requests from utilities, it has interpreted the law in such a manner as to maximize secrecy.

We support rational measures to protect information that should be kept secret. But we believe the present procedures applicable to requests for information about water utilities far exceed any reasonable means needed to protect public safety. In fact, the present blackout on information poses a risk of its own. There is no better protection against harm to public waters than an informed and alert public.

Present Procedures

Although there are many repositories of information regarding water utilities, the law as interpreted today requires an approach to DPH. This is also the best path for research, as DPH should have in its possession all important water-company information. Any party, including the US Geological Survey (USGS), who requests information from the DPH about a particular water company or the operations of water companies in general will face a period of vetting that will range from a few weeks to a yet-to-be-determined time. Thus far, no request has been fully granted. DPH will only release heavily redacted water supply plans, evidently will not release information on identified future water resources, and would not release specifics on the movement s of water to the USGS for purposes of a regional water study.

The law seems to require that in order to determine whether there are reasonable grounds to believe disclosure of information would pose a safety risk, 1) DPH must refer to the FOI request to the Department of Public Works (DPW); 2) DPH must notify the water company involved; 3) DPH and or DPW must also refer to the request to Emergency Management and Homeland Security (EMHS). 4) The determination as to the status of the material requested must be agreed to by DPH, DPW, EMHS, and the water company or companies involved.

The notification to water utilities is unique under FOI law. The thinking was that collectively, DPH, DPW, and EMHS might not be able to understand what should be kept secret. In addition, the new laws (PA 02-133 and PA 03-6, the Budget Implementer) mention water companies in greater detail than any other type of infrastructure, including power plants, chemical facilities, communications, transportation, and so forth.

The result is that teams of lawyers and other staff experts do a line-by-line review of requested material, redacting names of reservoirs, all illustrations, maps, or picture files (such as a company's charter), performance records, and so forth. The process is like trying to protect transportation security by hiding the names and locations of train stations.

This secrecy process, however, only applies to public requests. In the case of the Groton Drinking Water Quality Management Plan, funded by the state at \$200,000, DPH encouraged the utility to post online watershed maps and all sorts of other

materials that would not be available by request. The explanation for this inconsistency, according to DPH, is the utility did not think that wide release of the information posed a risk to safety. We agree. The whole purpose of the project, launched in **House Bill No. 5470: Special Act No. 06-6**, is to educate the public on how to protect water resources. The material was public throughout the process of developing the plan and was posted online in 2008.

Rivers Alliance believes that the open approach taken in Groton is the right interpretation of the intention of FOI law. This approach was developed and implemented under current law. It involves a presumption that there is a benefit in educating the public concerning the features of their present water supply and future needs. There is also obviously a public interest in understanding the finances of water companies and how their rate structures work.

The Connecticut Water Works Association and the Water Planning Council have expressed interest in finding a fair solution to the secrecy dilemma, but progress has been slow.

Therefore, we propose the following changes in the present statute.

Sec. 1-210. (Formerly Sec. 1-19). Access to public records. Exempt records. (a) Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212. Any agency rule or regulation, or part thereof, that conflicts with the provisions of this subsection or diminishes or curtails in any way the rights granted by this subsection shall be void. Each such agency shall keep and maintain all public records in its custody at its regular office or place of business in an accessible place and, if there is no such office or place of business, the public records pertaining to such agency shall be kept in the office of the clerk of the political subdivision in which such public agency is located or of the Secretary of the State, as the case may be. Any certified record hereunder attested as a true copy by the clerk, chief or deputy of such agency or by such other person designated or empowered by law to so act, shall be competent evidence in any court of this state of the facts contained therein.

(b) Nothing in the Freedom of Information Act shall be construed to require disclosure of:

A long list of exemptions follows. We skip to Number 19. Note: We are not seeking changes in paragraph that follows. PA 03-6 added water companies.

(19) Records when there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, any government-owned or leased institution or facility or any fixture or appurtenance and equipment attached to, or contained in, such institution or facility, except that such records shall be disclosed to a law enforcement agency upon the request of the law enforcement agency. Such reasonable grounds shall be determined (A) (i) by the Commissioner of Public Works, after consultation with the chief executive officer of an executive branch state agency, with respect to records concerning such agency; and (ii) by the Commissioner of Emergency Management and Homeland Security, after consultation with the chief executive officer of a municipal, district or regional agency, with respect to records concerning such agency; (B) by the Chief Court Administrator with respect to records concerning the Judicial Department; and (C) by the executive director of the Joint Committee on Legislative Management, with respect to records concerning the Legislative Department. As used in this section, "government-owned or leased institution or facility" includes, but is not limited to, an institution or facility owned or leased by a public service company, as defined in section 16-1, a certified telecommunications provider, as defined in section 16-1, a **water company, as defined in section 25-32a**, or a municipal utility that furnishes electric, gas or water service, but does not include an institution or facility owned or leased by the federal government, and "chief executive officer" includes, but is not limited to, an agency head, department head, executive director or chief executive officer. Such records include, but are not limited to:

(i) Security manuals or reports;

(ii) Engineering and architectural drawings of government-owned or leased institutions or facilities;

(iii) Operational specifications of security systems utilized at any government-owned or leased institution or facility, except that a general description of any such security system and the cost and quality of such system, may be disclosed;

(iv) Training manuals prepared for government-owned or leased institutions or facilities that describe, in any manner, security procedures, emergency plans or security equipment;

(v) Internal security audits of government-owned or leased institutions or facilities;

(vi) Minutes or records of meetings, or portions of such minutes or records, that contain or reveal information relating to security or other records otherwise exempt from disclosure under this subdivision;

(vii) Logs or other documents that contain information on the movement or assignment of security personnel;

(viii) Emergency plans and emergency preparedness, response, recovery and mitigation plans, including plans provided by a person to a state agency or a local emergency management agency or official; and

Note: Deletion sought below, to be replaced by general description of exempt material (underlined).

(ix) With respect to a water company, as defined in section 25-32a, that provides water service: Vulnerability assessments and security measures designed to defeat a deliberate, hostile action that would endanger public health. [and risk management plans, operational plans, portions of water supply plans submitted pursuant to section 25-32d that contain or reveal information the disclosure of which may result in a security risk to a water company, inspection reports, technical specifications and other materials that depict or specifically describe critical water company operating facilities, collection and distribution systems or sources of supply;]

Moving on. Note: Deletions sought below to standardize treatment of protected material. Deletion shown with brackets

(d) Whenever a public agency, except the Judicial Department or Legislative Department, receives a request from any person for disclosure of any records described in subdivision (19) of subsection (b) of this section under the Freedom of Information Act, the public agency shall promptly notify the Commissioner of Public Works or the Commissioner of Emergency Management and Homeland Security, as applicable, of such request, in the manner prescribed by such commissioner, before complying with the request as required by the Freedom of Information Act **[and for information related to a water company, as defined in section 25-32a, the public agency shall promptly notify the water company before complying with the request as required by the Freedom of Information Act.]** If the commissioner, after consultation with the chief executive officer of the applicable agency **[or after consultation with the chief executive officer of the applicable water company for information related to a water company, as defined in section 25-32a,]** believes the requested record is exempt from disclosure pursuant to subdivision (19) of subsection (b) of this section, the commissioner may direct the agency to withhold such record from such person.

Thank you for your patient attention

Margaret Miner
Executive Director

