FOR THE PUBLIC HEALTH COMMITTEE
PUBLIC HEARING TESTIMONY OF RIVERS ALLIANCE OF CONNECTICUT
March 13, 2017

RE: HB 7221 AAC Access to Water Planning Information *(Support)*

To: Chairmen, Sen. Terry Gerratana, Sen. Heather Somers, Rep. Jonathan Steinberg,
And Honorable Members of the Committee:

Rivers Alliance of Connecticut is a statewide non-profit organization, founded in 1992, as a coalition of river organizations, other conservation non-profits, individuals, and businesses working to protect and enhance Connecticut's rivers, streams, aquifers, lakes, and estuaries. We promote sound water policies and water stewardship through education and assistance at the local, regional, and state levels.

Thank you for the opportunity to remark on this bill. It addresses a problem concerning availability of water data, a problem that has been recognized and discussed in Water Planning Council and other policy venues for ten years. **The problem in a nutshell is that since 2003 water companies have had unique and wide-ranging exemptions from the Connecticut Freedom of Information Act (FOIA).**

These exemptions seriously interfere with public involvement in water planning and with customers' efforts to understand how their water utilities work. The exemptions, which have been rigorously implemented, also cripple the ability of environmental groups to study water-supply practices and to advocate for improvements. In 2003, when the legislature allowed these exemptions, the argument for their necessity was based on perceived immanent risk to water utility infrastructure. To be clear: **Rivers Alliance and other water-protection groups have NO interest in utilities' security arrangements,** such as computer codes, video and audio monitoring devices, employee monitoring, background checks, top-quality locks and housing for chlorine, devices for operating valves, and so forth.

What we seek is information that will allow us to understand whether water companies are doing the best job possible of supporting the natural environment while providing ample supplies to customers. When our members or others report a stream run dry, we want to be able to find the cause.

We urge you to pass this law because it restores to the public reasonable access to water company records. It does not compromise prudent security protections.

Here follows background material explaining how we got to this point and what Bill 7221 does:

Background on Negotiations in 2016

The problem of excessive water secrecy arose from three laws passed in 2002 and 2003 that gave water companies unique rights to refuse requests from the public, including customers, to see vital data about water company resources and practices, including how much water is where.

These laws were based on assertions that water utilities were particularly at risk of terrorist attack -- more so than nuclear facilities, chemical companies, transportation infrastructure, power grids, or communications networks. Rivers Alliance opposed the most expansive of these new secrecy provisions (we did not oppose all the new language). We were told that we could be personally responsible for the death of 100,000 people.

Since then, any FOI request for basic water utility information, such as a water supply plan, has led to months, even years, of delay. Requests from Rivers Alliance, in 2007-2010, for water supply information, led eventually to the release of heavily redacted documents, for example, with parts of executive summaries and mission statements blacked out, margins of safety deleted and some pages totally removed. Most often, now, the redactions are somewhat lighter, but they still hide key information needed for general water planning and for water customers seeking answers to simple questions. **Not even the consultant for the state's comprehensive water planning effort, CDM Smith, is not allowed to see water supply plans or similar documents. All information must flow through another consultant, Milone and MacBroom, whose employees have signed confidentiality agreements with the state.**

Last year, the governor's office and the Department of Public Health took the lead in trying to find a solution to this excessive secrecy. Other relevant agencies supported the effort. **The bill before you reflects agreements reached a year ago.**

The approach suggested by the governor's office, which you see in Bill 7221, was to take the complicated water company language out of the main exemptions section of FOIA and to give water companies their own set of specific exemptions (see the end of the bill). Some of the specific exemptions truly apply to security, and we have no interest in these matters. Other items represent a considerable compromise on our part. The final section is new this year. It stipulates that material released by a water company subsequent to 2003 cannot be withhold now.

Negotiations broke down in 2016 largely because the water utilities wanted both specific FOIA exemptions in a new special section *and* the general privilege of claiming an exemption on security grounds. The breakdown of talks was essentially a win for the water companies; nevertheless it was a disappointment to many people on *both* sides of the table who had been hopeful of a solution.

Shortly thereafter, the Metropolitan District Commission (MDC) went to the Department of Homeland Security in Washington and got a comprehensive exemption disclosure exemption for its *entire* water supply plan including founding documents, mission statement, conservation plans, etc. Even though this federal action was temporarily blocked on a technicality from being applied in Connecticut, it sent a strong signal of opposition to compromise. After ten years of talking, nothing seems to have changed. For example:

Dr. Valerie Rossetti, a resident of Bloomfield, who applied to see the MDC supply plan in March of 2016, still has received nothing, redacted or otherwise.

We ask you take the opportunity to effect change this year.

The problems associated with water-company secrecy became acutely obvious after passage of PA 14-163, which directed the Water Planning Council to develop a statewide, comprehensive water plan. Planning requires data such as the location and capacities of water sources, plans for future sources, boundaries of water company lands, and so forth. But data had been withheld even from the US Geological Survey and the Connecticut dam safety program, requiring some awkward walk-arounds. Many stakeholders, in government and out, began to question whether safety is improved by investing time and resources redacting documents that have no definite security connection. Risk to some degree cannot be eliminated. Reservoirs are at risk because they exist. They are not made measurably safer by trying hide their exact location or how much water is them.

We ask you to take this opportunity to seize a commonsense balance between security and appropriate public oversight of a public trust resource.

Thank you for your consideration. We most certainly stand ready to answer questions or assist in framing a good result.

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TABLE 2-5
System Demand, Available Yield, and Margin of Safety for Community Water Systems S

Community Water System	Reference Year	Average Day Demand (gpd)	Average Day Available Yield [1] (gpd)	Average Day Margin of Safety	Maximum Month Demand (gpd)	Maximum Month Available Yield [1] (gpd)	Maximum Month Margin of Safety	Peak Day Demand (gpd)	Peak Day Available Yield [1] (gpd)	Peak Day Margin of Safety
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[redacted]

Appendix re FOIA water-security laws

PA 02-102

The first of the post-2001 security laws was *Public Act 02-102 An Act Concerning Water Supply Plans and Water Diversions.* This law amended Section 25-32d of the general statutes, which relates to the creation of water supply. It reads in relevant part.

> … (b) Any water supply plan submitted pursuant to this section shall evaluate the water supply needs in the service area of the water company submitting the plan and propose a strategy to meet such needs. The plan shall include: (1) A description of existing water supply systems; (2) an analysis of future water supply demands; (3) an assessment of alternative water supply sources which may include sources receiving sewage and sources located on state land; (4) contingency procedures for public drinking water supply emergencies, including emergencies concerning the contamination of water, the failure of a water supply system or the shortage of water; (5) a recommendation for new water system development; (6) a forecast of any future land sales, an identification which includes the acreage and location of any land proposed to be sold, sources of public water supply to be abandoned and any land owned by the company which it has designated, or plans to designate, as class III land; (7) provisions for strategic groundwater monitoring; **[**and**]** (8) an analysis of the impact of water conservation practices and a strategy for implementing supply and demand management measures; and (9) on and after January 1, 2004, an evaluation of source water protection measures for all sources of the water supply, based on the identification of critical lands to be protected and incompatible land use activities with the potential to contaminate a public drinking water source.
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> (c) For security and safety reasons, procedures for sabotage prevention and response shall be provided separately from the water supply plan as a confidential document to the Department of Public Health. Such procedures shall not be subject to disclosure under the Freedom of Information Act, as defined in section 1-200, as amended. Additionally, procedures for sabotage prevention and response that are established by municipally-owned water companies shall not be subject to disclosure under the Freedom of Information Act, as defined in section 1-200, as amended.
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> **[**(c)**]** (d) The Commissioner of Public Health, in consultation with the Commissioner of Environmental Protection and the Public Utilities Control Authority, shall adopt regulations in accordance with the provisions of chapter 54. Such regulations shall

include a method for calculating safe yield, the contents of emergency contingency plans and water conservation plans, the contents of an evaluation of source water protection measures, a process for approval, modification or rejection of plans submitted pursuant to this section, a schedule for submission of the plans and a mechanism for determining the completeness of the plan. ….

Rivers Alliance of Connecticut (RA), which has protested the subsequent security laws, supports this first law. It provides for security, but clearly does not contemplate withholding basic information; in fact, it calls for gathering new information. ***RA has maintained that this law, PA 02-102, should be the standard for security measures.***

PA 02-133

Next was *Public Act 02-133 An Act Concerning the Disclosure of Security Information under the Freedom of Information Act.* This extended to municipalities and to water utilities FOIA exemptions already accorded to the state. At the public hearing, the Connecticut Conference of Municipalities and the CWWA spoke in favor; no one spoke in opposition. Here is some of the language. Deletions are in brackets and new language is underlined.

"(19) Records **[**, the disclosure of which the Commissioner of Public Works or, in the case of records concerning Judicial Department facilities, the Chief Court Administrator, has**]** when there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, any **[**state-owned**]** 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) with respect to records concerning any executive branch agency of the state or any municipal, district or regional agency, by the Commissioner of Public Works, after consultation with the chief executive officer of the agency; (B) with respect to records concerning Judicial Department facilities, by the Chief Court Administrator; and (C) with respect to records concerning the Legislative Department, by the executive director of the Joint Committee on Legislative Management. 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, as amended, a certified telecommunications provider, as defined in section 16-1, as amended, 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 **[**shall**]** include, but are not limited to:

[(A)**]** (i) Security manuals or reports; **[**, including emergency plans contained or referred to in such security manuals; **]**

[(B)**]** (ii) Engineering and architectural drawings of **[**state-owned**]** government-owned or leased institutions or facilities;

[(C)**]** (iii) Operational specifications of security systems utilized at any **[**state-owned**]** 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;

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

[(E)**]** (v) Internal security audits of **[**state-owned**]** government-owned or leased institutions or facilities;

[(F)**]** (vi) Minutes or **[**recordings**]** records of meetings**,** **[**of the Department of Public Works or the Judicial Department,**]** or portions of such minutes or **[**recordings**]** records, that contain or reveal information relating to security or other records otherwise exempt from disclosure under this subdivision; **[**and**]**

[(G)**]** (vii) Logs or other documents that contain information on the movement or assignment of security personnel at **[**state-owned**]** government-owned or leased institutions or facilities; and

(viii) Emergency plans and emergency recovery or response plans;

This law extends exemptions to matters beyond sabotage or enemy attacks. Any "safety risk" of any sort, including a risk of damage to any equipment or appurtenance, is grounds for withholding information. There need not be any risk to humans. In fact, the AG's office argued before the FOI Commission (FOIC) that, even if exercising the exemption would *increase* the risk to humans, the utility would still be able to use the exemption. These interpretations of the law were affirmed in FOIC decisions.

Under this law, the person responsible to decide what utility information should be disclosed is not required to have any security experience, but is required to consult with the head of whatever agency has received the FOI request. Most requests are to be forwarded to the Department of Public Works (DPW) because the statute was originally designed to thwart domestic prisoners who might be researching ways to escape from prison.

Some of the apparently small changes in this law mean major changes in the range of exemptions from FOI requirements. For example, the original statute provided for secrecy for portions of minutes from meetings of DPW or the Judiciary Department. The new law stretches this provision to *all* minutes of any public entity in the state. For example, if a water utility were to make a presentation to a local board of finance on the need for funding a new water main, that section of the minutes could be redacted because the locations and sizes of water mains are now subject to homeland-security secrecy rules.

In the original statute, emergency plans *in security manuals* could be kept secret. In the new law, *all* emergency plans and emergency-recovery-and response plans can be kept secret. This is stricter than federal law (FOIA, USC Section 552 Title 5), which says one cannot withhold emergency response plans from the public. Why? Because the federal government recognized that it is in the public interest to know whether or not utilities and other key industries have adequate response plans. We now know from experience that many such plans are completely inadequate. (BP's plans for dealing with an ocean spill off Louisiana called for rescuing walruses.)

Federal facilities are not covered in this statute.

PA 03-6

The most severe limitation on the public's right to know was effected in the 2003 budget implementor bill. (PA 03-6 passed in the summer special session.) Rivers Alliance attempted to negotiate more sunlight but without success, other than a letter of agreement with the CWWA that we would mutually try to resolve difficulties. So far there has been discussion but no results pursuant to this agreement.

The 2003 budget implementor law gave water companies a unique status under Connecticut FOI law.

First, it specifically allows them to claim secrecy rights for virtually all their records.

Second, the government is *required* to consult with a water company that wants to withhold information requested under FOIA. In all other cases, the government may, if it wishes, consult with the non-responding party; but such consultation is not required before a decision as to whether to release information. The reasoning behind the mandatory consultation was that people in DPW or the Department of Emergency Management and Homeland Security (DEMHS) might not know enough about the security appropriate to water utilities to make a sound decision on what should be released or kept secret.

Third, the law widened secrecy rights to include the records of private water companies submitted to public agencies, in addition to the exemptions previously given municipal utilities.

Here is the language specifically referencing the broad range of documents water companies can withhold from the public. Note that here and below references to water utilities have been changed to water companies. (Under prior law, if a private water company delivered a document to a state agency, it became a public document. This change ensured that documents from private companies would be accorded the same secrecy right as those from public utilities.)

(ix) With respect to a water company, as defined in section 25-32a, that provides water service: Vulnerability assessments 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;

Here's the language giving water companies special status with regard to consultation.

(d) Whenever a [state] 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 of such request, in the manner prescribed by the commissioner, before complying with the request as required by the Freedom of Information Act and for information related to a water company. . . ,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 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.

The interesting innovation here is that the public agency that receives an FOI request re water supply must notify both DPW and the water company. DPW then apparently may consult with either the agency or the company (the language is ambiguous). In any case, DPW can follow the advice of one or the other (or neither) in deciding on the response to the request. Consensus is not required.

The most sweeping change was the inclusion of water supply plan as exempt documents.

End