TOWN OF MILLIS

TO: **Water Management Act Blue Ribbon Panel**
FROM: **Charles J. Aspinwall, MMA Representative**
DATE: **September 8, 2006**
RE: **Outline of Municipal Concerns – DEP WMA Policy**

Communities in the Ipswich River Basin and the Charles River Basin have been reacting to the DEP's implementation of its water management policy since it was issued in 2004. Communities in other river basins have expressed serious concerns with provisions of the DEP policy as well as DEP's decision to implement water use restrictions via policy. Opposition to the DEP policy has already cost communities hundreds of thousands of dollars just to bring the issue before a court so that we may finally get a review of the policy by an independent judiciary and a judicial review of the implications of regulating by policy. If nothing is done to change this then communities will end up collectively spending millions of dollars opposing the DEP policy. While each community bears a significant cost in appealing its permit, that cost pales in comparison to the costs of complying with the unreasonably onerous requirements of the policy.

Judging by my conversations with Town Managers and Administrators in other communities in other river basins, DEP will likely see the same opposition as it proceeds to renew other community Water Management Act permits. If the Commissioner of DEP is truly concerned about the cost of litigation as expressed in the March 27, 2006 Final Decision in the Matters of Hamilton, Topsfield and Wenham and in the letter of January 18, 2006 to Interested Party[ies], then the implementation of the policy ought to be suspended until such time as this Panel and the Legislature completes its review of the policy. I understand that the so-called "time out provision" did not make it into the legislation that created this Panel. In my opinion, this does not preclude us from making such a recommendation.

The legislation which created this Panel calls for a review of the DEP policy by a balanced panel of committee members. I have reservations with the composition of the Panel and question whether the Panel is balanced and can conduct an impartial review of the facts and circumstances surrounding the development and implementation of the

policy. Be that as it may, as my colleague from the MMA said, this is the only forum we have right now to report back to the legislature on this issue. That is why I am here to represent municipal concerns.

Before I get into specific concerns with the policy, I do have other administrative concerns. Three to four two hour meetings do not contain enough time to properly examine the issues before us. More frequent meetings can be held or deadlines set by the Legislative Committee can be reconsidered at our request by the Committee. The Panel will not truly know how much or how often we must meet until such time as all panelists report on their concerns. Second, I am concerned with the limitation of discussion to panelists only and the ability of panelists to defer to others in their constituent organizations or to seek information from others. These two administrative actions appear to limit the discussion of the issues.

Relative to the Water Management Act itself, the DEP has an affirmative obligation under the act to balance competing water withdrawals. DEP's decision to construct a policy, rather than go through the effort required to enact regulation, virtually ensured that the DEP could not fulfill its obligation to "balance" the competing water withdrawal interests. We do not think it is lawful for DEP to issue policy and guidance where regulation, with its attendant opportunities for input, is required.

The WMA requires input in rule making regarding the act, requires participation of <u>all</u> affected groups, and requires analysis by DEP of competing water withdrawal interests and the development of specific scientific conclusions which support their decisions. The study referenced in DEP's April 2004 policy expressly states that its conclusions were limited by the lack of readily available information as to some of the relevant factors, and acknowledges that further study is required. The scientific data that is available suggests that restrictions on water use alone will not have a significant environmental impact unless other complementary measures are implemented, and that <u>other measures can contribute to the restoration of wildlife habitats without the need for dramatic restrictions on water use.</u>

While DEP officials have questionably stated they created the policy without influence from environmental groups, municipalities or water suppliers, the facts are that in 2003 the Ipswich River Watershed Association filed a lawsuit against DEP in Superior Court alleging that the DEP failed to adequately protect wildlife habitats. As part of the lawsuit, the Ipswich River Watershed Association demanded that DEP review existing permits and issue amended permits with conditions limiting water withdrawals. Within weeks of the filing of that lawsuit, the DEP amended permits held by communities within the Ipswich River Watershed and imposed the conditions that were subsequently set forth in the April 2004 policy. Significantly, upon issuance of the amended permits, the lawsuit was withdrawn.

To satisfy its obligation with respect to balancing all competing uses of the water supply, DEP should have more fully investigated other approaches before amending these permits. DEP has clearly failed to achieve a balance

among competing water withdrawals and uses by refusing to explore alternatives to restrictions on water use and by relying upon incomplete studies to justify its position. Had DEP carried out its statutory mandate through an open process, it would not have rushed to judgment and would have fully studied the issues, with input from all interested parties.

Municipal officials are confronted daily with service delivery decisions which are made difficult by the continued assault on our budgets by outside forces including unfunded mandates, limited and uncertain revenue streams, and hard to control fixed costs. We have concerns that this policy will exacerbate our already uncertain financial futures by forcing municipalities to substantially increase tax rates or water rates to cover the costs of operating and maintaining our public water supplies. The DEP policy will force municipalities to incur significant costs to implement the requirements of the amended permits, and will have to be passed on to our residents. Additionally, municipalities will be forced to expend significant financial resources mounting legal challenges to the amended permits.

We believe this policy will have a continued negative effect on continued and sustainable economic growth throughout the Commonwealth and that the implementation costs will burden and harm municipalities. Uncertainty is the death knell of meaningful and sustainable development. Millis is certain that developers, facing increased permitting and its attendant costs, will go elsewhere when they learn they must find uncertain alternatives to offset their development project's consumption of water.

In Millis, the policy has already raised concerns among our citizens that this is just another vehicle for the state to pass a state burden or tax on to municipalities. In Millis, the policy has been named the Romney-Healey water tax. It is seen as a tax on Millis' future. Last year, with the help from a state grant from the DHCD, Millis passed a zoning initiative that allows more intense use of its downtown area. This is consistent with the Romney Healey Administration's smart growth initiatives. Millis has grown slowly over the last two decades and while we currently have the permitted water pumping capacity for new development, with the proposed conditions considered by DEP, we won't have the water to offer builders who want to build to help Millis grow. Municipalities are starved for new revenue sources and a more intense use of land, which prevents urban sprawl, can help cities and towns to generate new revenue to meet existing service demands.

Another example of the how the DEP policy is inconsistent with the Romney-Healy Administration growth policies is evident in how the Administration wants to develop the Medfield state hospital property. The Commonwealth has proposed 440 housing units on the property but DEP has not offered one new gallon of permitted water pumping capacity to address increased demand in Medfield's water system. The policy has also not addressed whether communities that are forced to accept Chapter 40B housing developments will be provided with additional permitted pumping capacity to address water demand from those projects. The Panel needs to call DEP to task to

show how the department considered economic and housing development in their consideration of the balance of competing water withdrawals.

Mr. Chairman, I was not an "A" student in my college biology class. However, I did fairly well in English. I generally understand what I read. When a study, such as the study
referenced as the basis of DEP's policy specifically warns against using the study conclusions for any purpose other than comparing basin flow, then I do not think I need a Ph.D. in biology to understand that these conclusions ought not be used as the scientific underpinnings of a policy that could eventually affect every community in every river basin in Massachusetts. Others will speak more effectively on the problems associated with the science of the policy. I can only say that a sound scientific basis is necessary to get the public to buy into and comply with a sound water policy. It takes years to get the public to adjust to new environmental initiatives. Just look at the problems the Commonwealth has had in meeting its recycling goals. Together we ought to develop a sound water regulatory framework that the public understands, that state and local officials and environmentalists can support, and which will work in practice, not just on the paper the permit is printed on.