



Commonwealth of Massachusetts  
Executive Office of Energy & Environmental Affairs

## Department of Environmental Protection

One Winter Street Boston, MA 02108 • 617-292-5500

Charles D. Baker  
Governor

Karyn E. Polito  
Lieutenant Governor

Matthew A. Beaton  
Secretary

Martin Suuberg  
Commissioner

**Julia Blatt, Executive Director**  
Massachusetts Rivers Alliance  
14 Beacon Street, Suite 607  
Boston, MA 02108

**Ian Cooke, Executive Director**  
Neponset River Watershed Association  
2173 Washington Street  
Canton, MA 02021

September 22, 2017

Dear Ms. Blatt and Mr. Cooke,

This letter is in response to your petition received by MassDEP on March 20, 2017. In accordance with regulatory requirements under 310 CMR 2.03 and 2.04, MassDEP held a public meeting on September 12, 2017 to consider the petition and to take comments and questions on the petition. This opportunity allowed for representatives of the Massachusetts Rivers Alliance to present their views on the petition to more than 100 meeting participants and for more than 30 stakeholders to formally offer their views. In addition MassDEP received and reviewed written comments from over 50 different individuals and organizations. The efforts of the Massachusetts Rivers Alliance related to implementation of the Water Management Act are greatly appreciated.

As you will see from the Petition Action document attached, MassDEP has made a determination not to make amendments to the Water Management Act regulations or impose conservation conditions on registrations at this time. The reasons for this determination are

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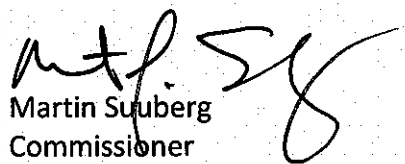
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articulated in detail in the attached document. While not pursuing rulemaking at this time, MassDEP is planning further work related to water withdrawals in the Commonwealth. Registration renewals are scheduled to take place in 2021 and as we approach that process, MassDEP will evaluate the results of the following studies and efforts to determine if additional regulatory action is warranted:

1. Assessing the water savings achieved if certain demand management strategies and water conservation standards were implemented in flow-stressed basins. MassDEP will utilize the Ipswich and Parker River Basins to develop and conduct this assessment. The assessment will consider water savings achieved by applying the conservation standards on registered-only public water suppliers, on private wells, and on known unregulated withdrawals (those withdrawals that fall below the regulatory threshold, but are not intended for use by a single homeowner). This assessment will also help to define the universe of below threshold withdrawal volumes.
2. MassDEP will be evaluating ways in which additional water saving actions can be implemented during times of severe drought. This evaluation will include a legal review of MassDEP's authority related to the regulation of non-essential outdoor water use in cities and towns without a WMA permit during a declared drought.
3. Developing and implementing a Commonwealth-wide educational campaign about the importance of water conservation, highlighting outdoor water use best practices.

We will reach out to you and other stakeholders in the months ahead to get input on these efforts and to discuss our progress. Thank you for your continued interest and work on Water Management Act programs.

Sincerely,

  
Martin Suuberg  
Commissioner

Enc: The Massachusetts Department of Environmental Protection's Action on the Massachusetts Rivers Alliance Petition

**The Massachusetts Department of Environmental Protection's  
Action on the Massachusetts Rivers Alliance Petition**

**I. Introduction of the Massachusetts Rivers Alliance Petition**

On March 20, 2017, pursuant to M.G.L. c. 30A, § 4, the Massachusetts Rivers Alliance (MRA) filed with MassDEP a "Petition for the Promulgation of Revised and Amended Regulations that Impose Conservation Conditions on all Registrants to satisfy the purposes of the Massachusetts Water Management Act, the Water Conservation Standards (June 2012, as amended), and the Public Trust Doctrine" ("Petition").

Pursuant to the regulatory requirements under 310 CMR 2.03 and 2.04, MassDEP held a public meeting on September 12, 2017, to consider the Petition and to take comments and questions on the Petition. More than 100 members of the public attended. At the meeting, MassDEP received additional comments from MRA, as well as verbal comments from at least 30 other meeting participants. To date, MassDEP has also received written comments from more than 50 different individuals and organizations.

Within ten days after the meeting, MassDEP must determine whether to schedule the Petition for further proceedings in accordance with 310 CMR 2.05 or 2.06, and then notify the petitioners of MassDEP's action. For the reasons stated below, and while it is gathering additional information, MassDEP has determined that it will not amend the purpose section of the Water Management Act regulations or impose conservation conditions on registrations at this time. Therefore, it is not necessary for MassDEP to schedule further proceedings on MRA's requested amendments to 310 CMR 36.02 and 310 CMR 36.07.

**II. Applicable State Law for Filing and Responding to the Petition**

Under M.G.L. c. 30A, § 4, "[a]ny interested person may petition an agency requesting the adoption, amendment or repeal of any regulation, and may accompany his petition with such data, views and arguments as he thinks pertinent. Each agency shall prescribe by regulation the procedures for the submission, consideration and disposition of such petitions."

Accordingly, MassDEP's Adopting Administrative Regulations, 310 CMR 2.00, detail what must be included in a petition and how MassDEP must respond to such petition. 310 CMR 2.02 states that:

"Any interested person or his attorney may at any time petition the department to adopt, amend, or repeal any regulation. ... All petitions shall be signed by the petitioner or his attorney, contain his address ..., and set forth clearly and concisely the text of the proposed regulation. The petition may be accompanied by any supporting data, views or arguments."

310 CMR 2.03 states that:

“Upon receipt of a petition for the adoption, amendment or repeal of a regulation submitted pursuant to 310 CMR 2.02 ... the department shall consider the petition ... at a meeting and shall, thereupon, determine whether to schedule the petition ... for further proceedings in accordance with 310 CMR 2.05 or 310 CMR 2.06 [procedures for rulemaking with or without public hearing]. If the regulation has been presented to the department by petition ..., the department shall within ten days after the meeting notify the petitioner of the department’s action.”

310 CMR 2.04 states that:

“During the meeting ..., the department may, but shall not be required to, entertain comments or questions from members of the audience.”

### **III. The Massachusetts Rivers Alliance Petition**

#### The Petitioner’s Request

The petitioners described two requests in the Petition, the first to delete four words from the “Purpose” section of the Water Management Act (WMA) regulations, and the second to adopt conservation-related conditions in the “Registration Conditions” section of the regulations. The Petition also included an Appendix A which purported to include proposed regulatory language for the new conditions, however the conditions as proposed in Appendix A and the conditions as described in the Petition were not entirely consistent.

First, the petitioners requested that MassDEP amend the “Purpose” section of the WMA regulations, 310 CMR 36.02, by deleting the words “above the threshold volume” from the sentence that currently reads as follows:

“310 CMR 36.00 is intended to establish enforceable standards, criteria and procedures that will enable the Department to comprehensively manage withdrawals above the threshold volume throughout the Commonwealth to ensure an appropriate balance among competing water withdrawals and uses and the preservation of the water source.”  
(Emphasis added.)

Second, the petitioners requested that MassDEP amend the “Registration Conditions” section of the regulations, 310 CMR 36.07, to add conservation conditions that would be imposed on all registrants upon renewal of their registration statements. In the body of the Petition, they requested the adoption of the following conditions:

- a) Preparation of a written water conservation plan that incorporates and achieves the Water Resource Commission’s Water Conservation Standards, including but not limited to, 65 residential gallons per person per day, 10 percent or less unaccounted for water, and a seasonal demand management plan restricting outdoor water use, which also considers recommendations under the current Water Conservation Standards.
- b) Requirement that all registration renewals be subject to the completion of the plan described above.

- c) Requirement that all annual reports of registrations include all actions taken in accordance with such plan.
- d) Requirement that all plans be subject to amendment to comply with streamflow standards and/or seasonal withdrawal restrictions as may be imposed by MassDEP upon further amendment of its regulations.

In Appendix A, the petitioners proposed specific language for an amended § 36.07. This included language reflecting their requests at b), c) and d) above. With regard to the written water conservation plan referred to in a) above, the language recommended for adoption in Appendix A only required such plans to include the following:

- i) System-wide leak detection audits to be conducted every two years;
- ii) Annual field surveys for leaks and expeditious repair of leaks;
- iii) Actions to be taken to achieve 10 percent unaccounted for water as defined under current Water Conservation Standards;
- iv) Verification of water metering accuracy and water meter repair;
- v) Public education for residents on water conservation measures for registrations involving public water use;
- vi) Water conservation measures taken or to be taken for registrations involving agricultural, commercial, industrial or institutional water use; and
- vii) Water conservation measures to be taken to accommodate withdrawal restrictions imposed by MassDEP on stressed basins.

Notably, the proposed regulatory language did not include a requirement that water conservation plans include a plan to achieve 65 residential gallons per person per day, or include a seasonal demand management plan restricting outdoor water use, as described in the body of the Petition.

In their presentation at the public meeting, representatives for the petitioners stated that their Petition also included a request that MassDEP “lower 100,000 gpd threshold volume for permits.” Although the Petition contained a request that MassDEP delete a reference to the threshold volume in the Purpose section of the regulations, the Petition itself did not specifically request that MassDEP amend the regulations to lower the threshold volume. Nevertheless, MassDEP will treat the Petition, its Appendix, and the petitioners’ meeting presentation in their entirety, and address all of petitioners’ proposed amendments and conditions regardless of when they were presented to the agency.

#### Petitioners’ Statement of Reasons

The petitioners’ statement of reasons for filing the Petition made several arguments in support of their request. First, they asserted that the underlying purpose of the Water Management Act (“Act”), G.L. c. 21G, as set forth in Section 3, is to “ensure an adequate volume and quality of water for all citizens of the Commonwealth,” and to “assure comprehensive and systematic planning and management of water withdrawals,” and that all regulations adopted by MassDEP must “conform to and implement the principles, policies and guidelines established by” the Water Resources Commission (“WRC”). Petition at ¶¶ 1-2. They explained that by allowing 60 percent of statewide water withdrawals to escape basic performance standards for water conservation, MassDEP is failing to implement a “comprehensive and systematic” approach to

water management. *Id.* at ¶ 10. They pointed out that in Water Dep't of Fairhaven v. Dep't of Env'tl. Prot., 455 Mass 740 (2010), the Supreme Judicial Court “affirmed the authority of the Department to promulgate regulations conditioning its issuance of 10-year registration renewals with reasonable water conservation measures.” *Id.* at ¶ 4. They concluded that despite MassDEP’s authority to condition registrations through regulations, the current regulations “improperly insulate withdrawal registrations” from the Act, the WMA regulations, and the WRC’s standards and policies. *Id.* at ¶ 4.

Next, the petitioners argued that MassDEP’s failure to condition registered withdrawals abrogates the principles of the Commonwealth’s public trust doctrine. *Id.* at ¶¶ 13-17. They quoted from the WRC’s Water Conservation Standards (“Standards”) language describing the Commonwealth’s obligation to “preserve the Commonwealth’s water resources, as part of the public trust” as evidence that the Act was founded on the principles of the public trust doctrine. *Id.* at ¶ 14. They explained that the Standards “recognize surface and groundwater as integrated components of the public trust ... a concept that is clearly incorporated in Section 3 of the Act which mandates that groundwater and surface water be managed as a ‘single hydrological system.’” *Id.* at ¶ 16. They concluded that by not applying the WRC’s water conservation performance standards to registered withdrawals, MassDEP “undermines and defeats the collective interest of the public in public trust property.” *Id.* at ¶ 17.

Turning to climate change, the petitioners argued, on the basis of reports issued by the Union of Concerned Scientists, the federal Environmental Protection Agency and the Massachusetts Office of Energy and Environmental Affairs, that in the future Massachusetts will experience warmer winters and hotter, drier summers accompanied by more frequent droughts. *Id.* at ¶ 19. They stated that because groundwater withdrawals are proven to have the most significant impact on flows during periods of drought, MassDEP’s failure to impose conservation conditions on registered withdrawals will compound the impacts of climate change. *Id.* at ¶ 23.

Anticipating an argument from MassDEP that imposing conservation conditions is wholly discretionary, the petitioners argued that “insulating 60 percent of authorized water withdrawals from these reasonable, necessary and ‘important’ water conservation conditions is in fact arbitrary and capricious and an abuse of the Department’s discretion.” *Id.* at ¶ 25. They cited Boston Gas Co. v. Dep't of Telecomm. & Energy, 436 Mass. 233 (2002), and Brockton Power Co. v. Energy Facilities Siting Bd., 469 Mass. 215 (2014), for the proposition that “[a]gency discretion that remains unexercised in the midst of compelling circumstances that demand action, is discretion clearly abused.” *Id.* at ¶ 26.

Circling back to the Act itself and the regulations, the petitioners argued that by incorporating the WRC’s Standards into permits but not registrations MassDEP is not “managing ground and surface water in the commonwealth as a single hydrological system” nor is it promulgating regulations that “conform to, and implement, the principles, policies and guidelines established by the commission,” as required by the Act in Section 3. *Id.* at ¶¶ 28-31. Quoting language about “balancing among competing water withdrawals and uses and the preservation of the water source” and “balance[ing] human and ecological water needs” from the “Purpose” section of the regulations, 310 CMR 36.02, the petitioners concluded that MassDEP was in violation of its own regulations by not imposing water conservation standards on registered withdrawals. *Id.* at ¶ 31.

Finally, the petitioners argued that issuing renewed registration statements without conservation conditions will violate the Massachusetts Environmental Policy Act (“MEPA”), G.L. c. 30, § 61, because MassDEP will not be minimizing damage to the environment. *Id.* at ¶¶ 32-33.

#### **IV. MassDEP’s Action on the Massachusetts Rivers Alliance Petition**

After reviewing the arguments and supporting data contained in the Petition, and the comments received at the September 12, 2017 public meeting, MassDEP is taking the following action on the Petition:

MassDEP disagrees with the petitioners that the phrase “above the threshold volume” should be removed from 310 CMR 36.02, because this section of the regulations as currently worded accurately reflects the department’s statutory authority to manage water withdrawals through registrations and permits. Also, MassDEP disagrees that lowering the threshold volume is a necessary or effective regulatory action at this time. MassDEP agrees with the petitioners that it has discretion to promulgate regulations imposing conservation conditions on registrations but it disagrees that it is compelled to do so by the Act, the WMA regulations, WRC policy or MEPA. MassDEP agrees with the petitioners that the purpose of the Act is to “establish[] a mechanism for managing ground and surface water in the commonwealth as a single hydrological system and ensuring, where necessary, a balance among competing water withdrawals and uses,” but also recognizes that the Act establishes specific regulatory mechanisms for undertaking that management. These specific statutory obligations supplant the public trust doctrine, so the department need only fulfill its obligations under the Act. The current WMA regulations, which were approved by the WRC, fulfill its duty to comprehensively manage the Commonwealth’s water withdrawals consistently with the Act’s goals and requirements and are not an abuse of discretion. MassDEP has carefully considered the pros and cons of imposing conservation conditions on registered withdrawals and has decided not to impose them at this time. Therefore, MassDEP does not intend to schedule the petitioners’ proposed regulatory amendments for rulemaking under 310 CMR 2.05 or 310 CMR 2.06.

#### **Proposal to Amend 310 CMR 36.02**

There is no need for MassDEP to delete “above the threshold volume” from the second sentence of 310 CMR 36.02 because this phrase accurately characterizes how the Act authorizes MassDEP to manage water withdrawals through registrations and permits. Although Section 3 of the Act speaks in very general terms about MassDEP’s responsibilities (“protect the natural environment of water in the commonwealth,” “assure comprehensive and systematic planning and management of water withdrawals and use in the commonwealth,” “establish[] a mechanism for managing ground and surface water in the commonwealth”), Section 4 of the Act clearly states that the “department shall not require any approval, other than that provided for in [G.L. c. 40, § 39C]<sup>1</sup> for withdrawals less than such threshold volume.” The Act sets up two mechanisms

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<sup>1</sup> G.L. c. 40, § 39C, requires municipalities to request MassDEP’s approval for construction of “dams, wells, reservoirs, pumping and filtration plants, buildings, standpipes, tanks, fixtures and other structures, including also purification and treatment works” for the purpose of maintaining a public water supply. These Section 39C

for MassDEP to manage withdrawal volumes: registrations and permits. G.L. c. 21G, §§ 5, 7. Section 5 of the Act provides that “[e]ach person making an existing withdrawal in excess of the threshold volume shall file a registration statement in accordance with the regulations adopted by the department ....” Section 7 of the Act states that “[n]o person may ... make a new withdrawal of more than the threshold volume of water from any water source ... unless such person obtains a permit in accordance with regulations adopted by the department.” Although MassDEP does have specific, limited authority under the Act to address below threshold withdrawals in certain circumstances,<sup>2</sup> the primary regulating mechanism established by the Act authorizes MassDEP to manage withdrawals through the issuance of permits and registrations for withdrawals above the threshold volume. See G.L. c. 21G.

### Proposal to Lower the Threshold Volume

The Water Management Act sets the threshold volume at 100,000 gallons per day and authorizes the department to issue permits and registrations for withdrawals above that threshold volume. G.L. c. 21G, §§ 4, 5 and 7. The Act also allows the department to raise or lower the threshold volume, by regulation, upon a finding that a different threshold is “necessary and adequate to protect the public health, safety and welfare.” *Id.* at § 4. If the department chooses to lower the threshold volume, it is required to adopt procedures and a deadline by regulation for a new registration period for anyone withdrawing above the new threshold volume. *Id.* at § 5. A determination by the department to lower the threshold volume would require, at a minimum, amendments to the definition of “threshold volume” and “voluntary registration statement” in 310 CMR 36.03 and would require the department to establish a new registration schedule in 36.04.

Before lowering the threshold volume, the department would need considerably more information than it currently has on the volume of below-threshold withdrawals and their impact on their respective watersheds in order to satisfy the statutory requirement that it make a determination that a lower threshold is “necessary and adequate to protect the public health, safety and welfare.” Therefore, because MassDEP does not currently have enough information and analysis to justify a reduction or to choose a specific new threshold volume, it will not proceed with rulemaking on this request, but will continue to gather information and study the impacts of below-threshold withdrawals.

### Proposal to Amend 310 CMR 36.07

- 1. MassDEP is not required by the Act, the WMA regulations, or MEPA to amend its regulations to include water conservation conditions for registered withdrawals.**

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approvals, granted under MassDEP’s drinking water program, are construction approvals for the delivery of safe drinking water and do not authorize any particular volume of withdrawal.

<sup>2</sup> MassDEP has authority to restrict below threshold withdrawals during a declared State of Water Emergency (G.L. c. 21G, §§ 15-17); authority to require municipal permittees to restrict non-essential outdoor water use of below threshold withdrawals through permit conditions (G.L. c. 21G, § 11); and authority under a separate statute, G.L. c. 111, to address threats to public health. In addition, during the initial registration period in 1987, the department also accepted and approved voluntary registration applications for withdrawals below the threshold volume. Those withdrawals are subject to the same regulations and conditions as registered withdrawals above the threshold volume.



Although MassDEP has the authority to amend its regulations to include water conservation conditions for registered withdrawals, a decision not to do so at this time is not a violation of the Act, the WMA regulations, or MEPA. Exercising this authority is a matter left entirely to MassDEP's discretion. The plain language of Section 3 of the Act states that MassDEP "shall adopt such regulations as it deems necessary to carry out the purposes of this chapter ...." G.L. c. 21G (emphasis added). With regard to registrations in particular, the only regulations the Act requires the department to promulgate are "regulations establishing procedures and forms for filing notifications and registration statements [and] reasonable registration fees ...." *Id.* at § 3. MassDEP has fulfilled this specific requirement to establish procedures and fees for filing registration statements and continues to carry out its more general duty to adopt regulations "as it deems necessary to carry out the purposes of [the Act]." *See* 310 CMR 36.00. Although not squarely before it, the Supreme Judicial Court in Water Dep't of Fairhaven v. Dep't of Env'tl. Prot., 455 Mass 740, 748-49 (2010), acknowledged the discretionary nature of MassDEP's attempt to condition registrations and the unique nature of registrations, nowhere suggesting that such conditions were mandated by the Act: "Pragmatically this means that the department, by regulation, may impose conservation measures on all water users, including registrants, but those conservation measures may not deny registrants their entitlement to existing withdrawals. ... If the department wishes to require registrants to take specified conservation measures, it must do so by regulation" (emphasis added).

The department acknowledges and implements measures to meet the broad goals of the Act in Section 3 to "establish[] a mechanism for managing ground and surface water in the commonwealth as a single hydrological system and ensuring, where necessary, a balance among competing water withdrawals and uses," and the Act's general requirement that "[a]ll regulations adopted by the department pursuant to this chapter shall conform to, and implement, the principles and guidelines established by the commission under this section." G.L. c. 21G. MassDEP executes these goals within the constraints of the remainder of the Act, which establishes registrations and permits as two different regulatory mechanisms for undertaking this management. *See id.* at §§ 5, 7. To that end, MassDEP has promulgated a comprehensive set of regulations for registration and permitting, in compliance with its obligations under the Act, exercising the discretion vested by the Act in the agency to determine how best to manage the Commonwealth's water resources. *See* 310 CMR 36.00.

As described above, the Act requires MassDEP to implement the policies of the WRC, but leaves it to MassDEP's discretion to determine how best to do that. *See* G.L. c. 21G, § 3. MassDEP's decision to apply the WRC's Water Conservation Standards to permitted withdrawals is an exercise of that discretion. It should be noted, however, section 3 of the Act requires the department to adopt regulations "with the approval of the commission." *Id.* The fact that the WRC has approved every promulgation of the WMA regulations indicates that the WRC agrees that the regulations conform to and implement its principles and policies. The most recent amendment of the regulations was approved by the WRC on October 21, 2014.

The Department's decision not to adopt conservation conditions for registrations at this time cannot be a violation of its regulations at 310 CMR 36.02 because this section of the regulations imposes no obligations on MassDEP. Like statutory language, the words of a regulation are to

be interpreted in accordance with their “usual and ordinary meaning.” Ten Local Citizen Group v. New Eng. Wind, LLC, 457 Mass. 222, 229 (2010). Section 36.02 is merely a statement by the department explaining its reasons for promulgating the regulations. It explains that the “Commonwealth’s water resources are public resources,” that the regulations are “intended to establish enforceable standards, criteria and procedures,” and briefly describes the Sustainable Water Management Initiative undertaken by the Executive Office of Energy and Environmental Affairs that informed the most recent changes to the regulations. This section contains no requirements for or restrictions on the agency itself or any regulated party, and therefore MassDEP cannot be in violation of this section.

Likewise, the Department’s failure to impose conservation conditions on registered withdrawals is not a violation of MEPA because MEPA does not impose any requirements on the renewal of registered withdrawals. The requirements of G.L. c. 30, § 61, only apply to approvals of projects that are required to file an Environmental Impact Report (EIR) under the MEPA regulations, 301 CMR 11.00. Renewals of registered withdrawals do not trigger MEPA review. See 301 CMR 11.03(4).

**2. The common law public trust doctrine does not impose additional requirements on MassDEP’s management of the Commonwealth’s water resources.**

The common law public trust doctrine cannot impose any additional obligation on the department to manage water withdrawals, separate and apart from its responsibilities under the Act, because the Act supplanted common law water rights. Massachusetts law holds that “where a statute has been enacted seemingly intended to cover the whole subject to which it relates, including a remedy for its infraction, other provisions of the common law, including such as are remedial in nature, are thereby superseded.” George v. Nat’l Water Main Cleaning Co., 286 F.R.D. 168, 187 (D. Mass. 2012) (quoting Sch. Comm. of Boston v. Reilly, 362 Mass. 334, 338 (1972)); see Salisbury v. Salisbury Water Supply Co., 279 Mass. 204, 207 (1932) (“Where ... legislation has been enacted which seems to have been intended to cover the whole subject to which it relates, it ... supersedes the common law.”). The petitioners themselves acknowledged the Act’s “statutory ... purpose to comprehensively manage water withdrawals.” Petition at ¶ 31 (emphasis added). The Act commissions the department to “adopt such regulations as it deems necessary to carry out the purposes of this chapter, establishing a mechanism for managing ground and surface water in the commonwealth as a single hydrological system and ensuring, where necessary, a balance among competing water withdrawals and uses.” G.L. c. 21G, § 3. Further, as the Fairhaven court explained, the Act was adopted because a Special Legislative Commission on Water Supply, established in 1977, had “found the existing legal framework to be inadequate to promote water conservation in the Commonwealth.” 455 Mass. at 745-46. Given the breadth of the Act’s purpose and grant of authority to the department, and the Legislature’s express dissatisfaction with the ability of the common law to protect the commonwealth’s water resources, there is no question that the Legislature intended the Act to supersede common law water rights, including any potential application of the common law public trust doctrine to water withdrawals. Therefore, department’s regulatory discretion and obligations with regard to registered withdrawals arise from the words of the Act and not the common law.

**3. MassDEP's decision not to apply conservation conditions to registrations at this time is not an abuse of discretion.**

MassDEP's policy decision to promulgate regulations that apply conservation conditions to permits but not registrations is an exercise of its discretion, not an abuse. The cases cited by petitioners for the proposition that "[a]gency discretion that remains unexercised in the midst of compelling circumstances that demand action, is discretion clearly abused" say no such thing. In Brockton Power Co. v. Energy Facilities Siting Bd., 469 Mass. 215 (2014), the Supreme Judicial Court upheld a decision of the Energy Facilities Siting Board ("EFSB") on a request for project changes to a proposed power plant. On all aspects of the EFSB's decision, the court accorded deference to the EFSB's reasonable interpretation of its regulations and found that its decision was in accordance with law, supported by substantial evidence and did not constitute an abuse of discretion. Id. In Boston Gas Co. v. Dep't of Telcomms. & Energy, 436 Mass. 233 (2002), the Supreme Judicial Court held that the Massachusetts Department of Telecommunications and Energy's imposition of an inefficiencies factor in a rate setting proceeding was within the department's discretion and supported by substantial evidence, but that the department's quantification of the factor was not sufficiently supported. In neither case did the court consider whether to determine that a lack of action on the part of the relevant agency was an abuse of discretion. See Brockton Power Co., 469 Mass. 215; Boston Gas Co., 436 Mass. 233. In fact, Massachusetts courts have held to the contrary. In Hougie v. Bd. of Registration in Med., 2105 Mass. Super. LEXIS 16, 6-7 (2015), the court held that "there is no such right under our statutes or law to bring a public action to review [an agency's] preliminary discretionary decision not to act" unless the person complaining has "a legal right ... affected by the agency's decision not to act." See also Berman v. Bd. of Registration in Med., 355 Mass. 358, 360 (1969) (unless a legal right is affected, there is no abuse of discretion in an agency's decision not to perform a discretionary act). In the present case, the petitioners have not asserted any legal right to have conservation conditions imposed on registered withdrawals, nor could they. Therefore, the department's decision not to exercise its discretion to promulgate such conditions cannot be an abuse of that discretion.

**4. MassDEP has made a policy decision not to impose water conservation conditions on registrations at this time while it gathers information about specific watersheds and considers approaches to drought conditions.**

MassDEP has made a policy decision, wholly within the broad discretion granted to it by the Act, not to impose conservation conditions on registered withdrawals at this time. While permitted volumes only represent 14% of the total volumes allocated by the department, the water conservation conditions requested by the petitioners are already effectively applied to 46% of the water allocated by the department because withdrawers that hold a permit and a registration must meet permit conditions for all of their withdrawals. With regard to two of the standards recommended by the petitioners, 65 residential gallons per capita per day (RGPCD) and 10% unaccounted-for water (UAW), the average values for withdrawals subject to permit conditions and registered-only withdrawals are similar: 57 RGPCD and 13% UAW for withdrawals subject to permit conditions; and 58 RGPCD and 17% UAW for registered-only systems not subject to permit conditions. Of the 59 registered-only PWSs, 73% are below 65 RGPCD and 44% are below 13% UAW. Based on the number of registered-only public water

systems, their current water use and irrigation practices, and uncertainty around how conditions would be applied to regional water systems, it has been and remains for now the department's determination that imposing water conservation conditions on registrations would likely result in little actual water savings.

Registered-only water systems have not increased their demands in 35 years and most have significantly reduced their demand over time. For example, the Massachusetts Water Resources Authority (MWRA), the largest registered-only water system, holds a registration for 313 million gallons per day (mgd), representing its actual use in the early 1980's, but now uses only about 200 mgd (202 mgd in 2016). Similarly, Springfield Water and Sewer Commission, registered for 41 mgd, has consistently withdrawn in low 30s in recent years (33 mgd in 2016). Imposing water conservation conditions on registered-only systems, some of whom are already effectively meeting the RGPCD and UAW standards, will remove their incentive to keep their overall demand below their registered volume.

Instead, the department has undertaken other efforts to encourage registrants to conserve water. For example, in FY2017 and FY2018, the department solicited interest from registrants and permittees to receive a free American Water Works Association (AWWA) M36 "Top Down" Audit from a private consulting firm. Four registrants participated in 2017.<sup>3</sup> The M36 audit allows public water suppliers throughout the Commonwealth to utilize a common methodology to articulate water loss needs and conservation. Developing uniform approaches for identifying and communicating water loss will allow public water suppliers and the department to work together to more efficiently set infrastructure and management goals that minimize costly and wasteful non-revenue water production, prioritize the replacement of aging infrastructure and manage infrastructure assets.

With regard to climate change, petitioners argue that MassDEP should impose conditions because "groundwater withdrawals are proven to have the most significant impact on flows during periods of drought." Petition at ¶ 23. Conditioning registrations would not, however, have any significant impact on groundwater withdrawals because over 90% of registered-only withdrawals are from surface waters. MassDEP has undertaken many initiatives throughout the agency to address climate change. For example, in 2015 the water bureau established a technical assistance program (the Water Utility Resilience Program or WURP) to work with water utilities statewide to enhance their resiliency to climate change. WURP supports Drinking Water (DW) and Wastewater (WW) utilities in developing or enhancing their resiliency to severe and hazardous weather events, including those caused by climate change. Assistance provided through this program include: identifying helpful and practical resiliency resources, finding opportunities for local and regional partnerships, offering infrastructure mapping and adaptation planning assistance, and coordinating training opportunities. WURP works closely with the MassDEP Emergency Preparedness Officer to ensure climate change resiliency is part of an all hazards approach to technical assistance for DW and WW utilities. WURP provides an avenue for the department to assist DW utilities with a comprehensive review of their resiliency to a changing climate, rather than approaching climate change on permit-by-permit or program-by-program basis.

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<sup>3</sup> The application period for FY2018 is still open.

## V. Conclusion

For the reasons stated above, MassDEP is fulfilling its statutory duty to manage the Commonwealth's water resources "as a single hydrological system[,] ensuring, where necessary, a balance among competing water withdrawals and uses." The Act leaves to the department's discretion to "adopt such regulations as it deems necessary to carry out the purposes of this chapter." Accordingly, MassDEP has and will continue to adopt regulations as it deems necessary to manage the Commonwealth's water resources, consistent with the goals and requirements of the Act, with the approval of the WRC. MassDEP is committed to conducting additional studies intended to determine the potential water savings achieved by applying water conservation standards to all registered and unregulated water withdrawals in two pilot basins: the Ipswich and Parker River basins. Additionally, MassDEP will continue to review its authority to impose water conservation conditions on all withdrawals during declared droughts. Over the next 12 months, MassDEP will begin to evaluate this information and determine whether additional regulation in these areas is warranted and will publish the results of those studies. Any future rulemaking would involve communication with stakeholders on regulatory approaches, would consider the Supreme Judicial Court's guidance in the Fairhaven decision and follow Chapter 30A notice and comment requirements.

Until that additional work is completed, and having reviewed the Petition, all comments received regarding the Petition, and considering all relevant data and circumstances, the department has determined not to amend its regulations at this time.

