



April 6, 2012

Ms. Kathleen Baskin
Director of Water Policy
Executive Office of Energy and Environmental Affairs
100 Cambridge Street, 9th floor
Boston, MA 02114

Re: Comments on Massachusetts Sustainable Water Management Initiative

Dear Ms. Baskin:

Conservation Law Foundation (CLF) is pleased to provide the following comments on the February 3rd Framework Summary, presented to the SWMI Advisory Committee. Our earlier comments to Commissioner Kimmell have apparently been circulated already.

First, we want to thank the Executive Office of Energy and Environmental Affairs (EEA), and the other agencies involved in the SWMI process over the past several years. This has been a trying and demanding effort for everyone involved. We acknowledge the leadership that EEA and its line agencies have exhibited during that time and the good faith efforts that all the participants made to better define and move forward on a set of issues that have been caught in lengthy public policy disputes. There is no question that the differences reflect the real-world concerns of the various stakeholders. CLF remains committed to the principle that the water supply needs of communities can be met while preserving the ecological integrity of the rivers and streams of the Commonwealth. We believe that Governor Patrick has also endorsed this strategic objective in our earlier meetings with him. CLF believes that the SWMI process advanced that principle as well and that the SWMI Framework is intended in good faith by EEA and its agencies to accomplish that objective.

Second, like many of the other stakeholders in the SWMI process, CLF is not satisfied with the results to date in general or with the SWMI Framework in particular. The positions of the parties remain far apart and the SWMI framework—while admirable in its intentions—will not produce the results that we believe are necessary in harmonizing human water needs with the demands of the natural ecosystem that so many of us value in Massachusetts.

It remains our view that the proposed definition of safe yield is not consistent with our understanding of the structure and intent of the Massachusetts Water Management Act and the agency's interpretive history of safe yield. The SWMI Framework does not provide the functional equivalent of safe yield as a limit on water withdrawals when sub-basin damage becomes too severe.



Having said that, the stream flow standards approach and tiering protocol, while not perfect, is a very valuable framework that attempts to focus on providing strong protections to the best sub-basins and enhanced analytical and regulatory requirements on water withdrawers who are located and are influencing hydrologic conditions in the worst sub-basins. We think the basic concept should be kept and refined so that its objectives can be achieved without inordinate delay or unsustainable burden on the DEP and its sister agencies. We will say a bit more about that below.

Third, we think that the state agencies and USGS have done some remarkably high quality and comprehensive work on developing a better ecological understanding of and a more objective toolbox for measuring the interactions that exist between biota and water withdrawals/impervious surfaces at the sub-basin scale. The agencies and individuals that contributed to that effort deserve great credit and thanks. That work provides a science and technical underpinning that is as good as exists anywhere that we are aware of; it will only improve with time. Permitting and water use management at both a sub-basin and at the basin scale can proceed on a far more objective and dynamic basis.

We also suspect that these new tools will become very important for municipalities as they try to improve on the ways that they integrate their growth interests with the preservation of their local natural systems. In that context, it will also be important to see how these tools and approaches can be linked with the water quality standards and discharge permitting realms in the future so that there is a real integration of ecosystem-based understanding and management across regulatory and planning programs.

Back to the SWMI framework itself, CLF does not think that DEP is being realistic about its capacity with limited staff to develop a regulatory program that will rehabilitate the sub-basins that are in the lowest tiers in any meaningful time frame. The language in the framework *could* lead to improvements but is still subject to significant interpretation and is almost tailor-made for delay-producing litigation. Moreover, the work load associated with applying the framework in its current form to all permitted withdrawers in all Tier 4 & 5 sub-basins in one permit cycle for many of the Commonwealth's basins seems unrealistic. We would like to see the framework make better use of legal presumptions and other burden of proof-based approaches with respect to the availability of less damaging alternatives so that the applicant or permittee bears the primary costs of the alternatives analysis without shifting that burden to the DEP or the public.

There have to be some mandatory flow thresholds below which withdrawals cannot be authorized and where existing permitted and registered withdrawals must have mandatory and significant mitigation requirements. It is our sense that virtually every conservation and watershed group participating in the SWMI process understands and accepts that this will take time but we are equally sure that there is consensus around ultimate ecological goal: elimination



of the seriously damaged Tier 4 & 5 sub-basins, which are—virtually by definition—already in violation of the state’s water quality standards.

Finally, it has to be said that the SWMI process appears to have failed—to date—to soften any of the ideological battle lines that continue to exist between water suppliers and the conservation community, whether those lines are based on the statutory meaning of safe yield, differences of opinions on the impacts that water withdrawals can have on natural systems, or fears about how the program might be applied in a particular situation. Indeed, the fact that this fight continues to be defined in terms of green lawns versus native brook trout by some (albeit only as a rhetorical flourish hopefully) is symptomatic of how far apart some of the stakeholders remain. We acknowledge that there have been concessions by all stakeholders that are reflected in the Framework but the reality seems to be that few organizations or individuals fully accept the Framework as currently envisioned as the path forward. As a consensus development mechanism, therefore, SWMI does not seem to have fully delivered at this point and CLF bears its own responsibility in this regard.

We look forward to reading and considering the comments of the water supply community on the Framework. We have already reviewed virtually all the comments that have been circulated. The substantive heft and specificity of those comments rival anything we have seen in any regulatory setting and we know that the agencies will give them careful consideration as you consider next steps. It may, in fact, be a valuable exercise to attempt to synthesize the comments and report that synthesis back to the SWMI Advisory Committee for further discussion and perhaps negotiation. We do not feel like we understand where the stakeholders strongly agree, agree, and strongly disagree (or why) on the various elements of the SWMI Framework.

At the end of the day, we remain convinced that there is a hierarchy of human water uses from indispensable to discretionary just as there is a range of circumstances in the Commonwealth’s rivers and streams from almost pristine to fully compromised. The biological conditions in a number of those compromised water bodies suffer from numerous sources of pollution-related insults; but the biology of a significant number of them suffer primarily because of the timing and extent of water withdrawals.

Since we haven’t read the full set of comments coming in on the SWMI Framework, it is not clear how many water suppliers continue to discount the role that their activities may be having in the environment. Moreover, it is difficult to overstate the power of denial in all human activities. The proposed peer review of the science may help with the acceptance of the relationship between water withdrawals and stream quality but it won’t get at the debate between green lawns and high quality sub-basins. The pilot programs may provide the bridge that will allow the water suppliers and municipalities, who are understandably conservative about their core water supply responsibilities, to work toward approaches that don’t create conflicts between the natural environment and meeting municipal needs at an affordable cost.



CLF certainly doesn't have a magic formulation of safe yield or stream flow standards/criteria or a sustainable water management framework. Nor do we imagine that a pristine environment is a possible, or even necessarily desirable outcome. But we do think that healthy and biologically diverse watersheds are critical to the long-term economic and social prosperity of Massachusetts and can be achieved in a cost-effective manner.

We understand that Governor Patrick and you share this vision. It must, therefore, remain the Commonwealth's ultimate goal and the SWMI process should go on. We reaffirm our interest and willingness to continue to work toward that objective.

Sincerely,

A handwritten signature in blue ink that reads "Peter Shelley". The signature is written in a cursive, flowing style.

Peter Shelley
Vice President