

August 13, 2012

Hand-Delivered

Mr. Michael A. Trainque, Chair,  
Southeast Watershed Alliance  
Pease Tradeport  
P.O. Box 22122  
Portsmouth, NH 03801

Dear Chairman Trainque and Members of the Southeast Watershed Alliance:

We, the undersigned, support the purpose and mission of the Southeast Watershed Alliance (SWA), as established in Chapter RSA 485-E. As is clear from its legislative charge, the SWA is intended to be a solutions-oriented body aimed at identifying and implementing solutions to restore and protect the health of the Great Bay estuary. We are pleased that SWA is making progress in areas such as the development of local stormwater management standards.

We are troubled to learn that the Municipal Coalition – comprised of a very small number of SWA communities (Portsmouth, Dover, Rochester, Exeter and Newmarket) – has requested SWA to sponsor a peer review regarding the nitrogen pollution problem in the estuary. We urge SWA *not* to engage in this effort for the following reasons.

First, to reiterate, the SWA was established to identify and implement solutions to reduce pollution in the estuary, including innovative solutions such as intermunicipal stormwater utilities and improved planning to reduce impervious cover. The Municipal Coalition is driven by narrow interests – namely, the cost of upgrading their sewage treatment facilities; in some cases grossly outdated facilities, such as Portsmouth’s Peirce Island sewage treatment plant which *still* operates with only primary treatment as opposed to the more protective secondary treatment levels mandated by the Clean Water Act). These narrow interests are not consistent with or in furtherance of SWA’s broader statutory mission.

Despite years of analysis by the Department of Environmental Services, and peer review by national experts, the Municipal Coalition has continued on an unrelenting path to discredit regulators with expertise in the area of water pollution – going so far as to charge them with “science misconduct” – and to politicize the science that has been conducted to date. These efforts, which to date have cost Municipal Coalition communities an amount approaching \$700,000, have done nothing to advance the cause of protecting the estuary and are a far cry from the constructive approach of sewered communities like Durham and Newington, which have expressed a willingness to solve the problem of nitrogen pollution rather than engage in costly bickering with regulators.

Second, as representatives of the Municipal Coalition surely know, on August 3, 2012, the U.S. Court of Appeals for the First Circuit issued a decision upholding a permit issued by the Environmental Protection Agency (EPA) for the Upper Blackstone Water Pollution Abatement District’s (District) sewage treatment plant in Massachusetts. There, the owner and operator of the facility at issue appealed the EPA’s permit on the ground that it had imposed a nitrogen limit

erroneously, because it failed to await additional modeling information being developed by the District.

The Court flatly rejected this argument and upheld EPA's permit. In doing so, it recognized that the Court's review of EPA's is deferential, particularly in areas of a scientific and technical nature. *Upper Blackstone Water Pollution Abatement Dist. v. U.S. Env't'l Prot. Agency*, No. 11-1474 (1<sup>st</sup> Cir. Aug. 3, 2012) (“[A] reviewing court must remember that [where the agency] is making predictions, within its area of special expertise, at the frontiers of science . . . . as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.”) (quoting *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)). Significantly, the Court also acknowledged the importance of avoiding delays under the Clean Water Act, stating with regard to the District's argument that EPA should have waited for further modeling:

[N]either the CWA nor EPA regulations permit the EPA to delay issuance of a new permit indefinitely until better science can be developed, even where there is some uncertainty in the existing data. The five-year term limit requires the EPA or state permitting authority to re-ensure compliance with the [Clean Water] Act whenever a permit expires and is renewed. Thus, in regular intervals, the [Clean Water] Act requires reevaluation of the relevant factors, and allows for the tightening of discharge conditions. The Act's goal of “eliminat[ing]” the discharge of pollutants by 1985 underscores the importance of making progress on the available data.

*Id.* (quoting 33 U.S.C. § 1251(a)(1)) (other CWA citations omitted).

In the face of a permitting process that must, as a matter of law, proceed in furtherance of the objectives of the Clean Water Act, and despite the fact that nitrogen related concerns already have been subject to rigorous review, including the technical expertise of regulators, it is unfortunate that members of the Municipal Coalition appear committed to spending yet further time and money in their effort to de-rail permitting authorities from their current path – a path designed to restore and protect the health of the estuary.

The interests of the remaining Municipal Coalition members are narrow – and they are not the interests of the SWA. The statutory charge of the SWA is an ambitious one that requires an innovative, solutions-oriented approach. In light of this charge, the magnitude of the issue before the SWA, and the SWA's limited resources, we strongly urge SWA generally not to become distracted from its work by the narrow and unproductive efforts of the Municipal Coalition in their attempt to reduce their individual obligations to upgrade sewage treatment, and, specifically, not to sponsor or otherwise involve itself in the peer review proposed by the Municipal Coalition.

Respectfully,

Peter Wellenberger, Great Bay Piscataqua Waterkeeper  
Conservation Law Foundation

Michael J. Bartlett, President  
New Hampshire Audubon

Mark Traeger  
Exeter-Squamscott River Local Advisory Committee

Michele Tremblay, Dana Truslow and David Borden  
NH Rivers Council

Don Swanson, President  
Coastal Conservation Association, NH Chapter  
Chapter

Oyster River Watershed Association

Board of Selectmen  
Town of Newington, NH

Jean Eno  
Winnicut River Watershed Coalition

Mitch Kalter, President  
Trout Unlimited, Great Bay