EXHIBIT
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BUREAU OF WATER PROTECTION AND LAND REUSE
OFFICE OF THE BUREAU CHIEF
FEB 03 2010

February 2, 2010

Paul Stacey
State Department of Environmental Protection
79 Elm Street
Hartford, CT 06106

Re: Connecticut Water Company Comments on Proposed Stream Flow Regulations

Dear Mr. Stacey:

Connecticut Water Company recognizes and supports the need for sound water resource policies and has consistently demonstrated that by supporting legislative initiatives, promoting water conservation, preservation of lands, donation of open space, source protection, and sustainability measures. We have worked cooperatively with stakeholders on many issues to balance environmental interests and provide for water supply needs. As a public water supplier, we have long been stewards of the environment and consider the state's water resources to be an integral part of the infrastructure that needs to be protected and maintained to provide for water quality, quantity and ecological goals.

Connecticut Water provides water service to 88,000 customers in 54 towns throughout Connecticut. We have a commitment to customer service and an obligation to provide safe and sufficient supplies to our customers and the communities we serve. We have 225 employees serving our customers each and every day, delivering safe, reliable water supply to meet the needs for public health, safety and economic development in our service towns.

Regulation of water in Connecticut is complex and subject to oversight by multiple state agencies with different legislative charges – the Department of Environmental Protection, the Department of Public Health, the Department of Public Utility Control and the Office of Policy and Management and the Office of Consumer Counsel. Accordingly, water policy and regulatory programs in Connecticut need to be developed in the context of achieving the collective needs of the environment, public health, public safety, agricultural, economic development and smart growth.

Connecticut Water joins with other water utilities and environmental groups to support adoption of streamflow regulations, *provided* they are consistent with the legislative mandate and provide the appropriate balance between environmental goals and other public health and safety needs. There was considerable debate and work to develop consensus among the stakeholders when the streamflow legislation was adopted in 2005. It is critical to honor the agreements and understanding of the parties at that time and to ensure the regulations meet the intent of the enabling legislation. We do not believe, however, the regulations, as proposed, are consistent with the legislative charge, achieve the necessary balance, or provide sufficient conditions or exemptions necessary to allow a public water system to meet its obligations to comply with regulations, as required by the statute.

MEETING THE SCOPE OF THE LEGISLATION

Throughout the stakeholder process to develop these regulations, Connecticut Water has voiced our concerns about including groundwater and made it clear that we did not believe the statute was intended to apply to existing groundwater supplies. As the proposed regulations include limitations on existing groundwater supplies, we are now left to present our position in the formal administrative process.

A review of the statute and the legislative history clearly demonstrates that the proposed regulation of groundwater goes beyond the scope of the legislation and the statutory authority. As such, we believe any provisions pertaining to regulation of groundwater should be deleted from the regulations at this time.

We have attached the legal opinion developed by Murtha Cullina LLP for your review and note some of the more compelling points:

- The impetus for the legislation and much of the debate in 2005 centered on the Shepaug River case and the need to extend protections from the prior minimum streamflow regulations to all streams, rather than continue to limit the applicability to streams stocked with fish by DEP. It was clearly articulated that the legislation was not proposed or intended to be a water allocation policy nor to address grandfathered diversions.

- The original jurisdictional language of Sec 26-141a remained the same except for the reference to stocked streams and rivers, which the Department has interpreted since 1979 to apply only to surface waters.

- The language in the bill which speaks to flow into an impoundment or diversion remains the same, and no new language concerning groundwater flows, supply wells, or impact of withdrawals was added in the amendment. This demonstrates the act did not grant new authority to regulate wells drawing from groundwater.

- Language in the original proposed bill SB1294 that would have incorporated definitions from the Diversion Policy Act into the streamflow legislation was deleted during the legislative process and development of final language. This was a result of concerns

raised among legislators and stakeholders that such language would have extended the state's authority to regulate any and all diversions beyond those types of structure regulated under the existing minimum streamflow standards. The changes, as reflected in the substitute language and ultimately adopted, demonstrate there was no intent to extend the authority for streamflow regulation to all diversions. It is, therefore, incorrect and inconsistent with the law to attempt to apply definitions from the Diversion Policy Act (from Section 22a-367 of the CGS) to the streamflow regulations to regulate groundwater supplies and limit the use of existing registered diversions, otherwise protected by law.

- The substitute language deleted references to rivers and streams "stocked with fish by the Commissioner." The OLR Analysis summary of the public act states, "The Act requires the Department of Environmental Protection (DEP) commissioner to revise water flow regulations for all rivers and streams where a dam impounds or diverts the water flow. It expands the scope of the regulations to all such rivers and streams, rather than just those DEP has stocked with fish."

- The legislative history/debate make it clear that the focus of the legislation was to respond to the Shepaug River case and extend the minimum flow regulations to unstocked streams rather than limit regulatory oversight to stocked streams as had been the case historically. In response to a question on the floor, Rep. Mary Mushinsky explained, "What we are fixing today is stocked versus unstocked."

  There was considerable discussion that the law was not for water allocation or to address or take away registered diversions. There are multiple references to efforts to address flow downstream of dams or impoundments in all rivers and streams and the need to provide the same protection as is provided to those stocked by DEP. Since the minimum streamflow regulations in place at that time were limited to surface water supplies, the utilities trusted that would be the extent of any new regulations and did not expect them to be expanded to include existing groundwater supplies.

- Further, testimony by then Commissioner Gina McCarthy on proposed legislation in the 2006 session of the General Assembly, *An Act Concerning Preservation of Rivers and Streams (HB 5277)*, indicated the Department did not have adequate authority (despite the 2005 Streamflow legislation) to limit withdrawals from registered diversions. The testimony stated, "Without the authority to place controls on the use and withdrawal of water taken pursuant to registered diversions, we cannot implement an equitable allocation system. In addition, while the Department may be able to limit adverse impacts caused by permitted diversions, we are unable to do anything about the degradation of Connecticut's waters caused by registered diversions....."

We acknowledge there may be a need to review registered diversions, and have indicated a willingness to participate in the process to further examine regulation of groundwater sources, but only in the context of a broader state water resource allocation plan. The proposed streamflow regulations being considered today, however, are not the appropriate vehicle to accomplish this.

Connecticut Water Company's position on this matter is supported by a recent law review article by a University of Connecticut law student which concluded, "Ultimately, legislative efforts to bring registered diversions under the state's regulatory authority have failed. Although a plain reading of the state's minimum streamflow statute could suggest otherwise, the overwhelming extratextual evidence indicates that registered diversions are still exempt from regulation."

Additionally, in conversations with former Representative Jessie Stratton, who chaired the Environment Committee from 1993-2003, she noted that while the floor debate in 2005 reflected the positives the bill would accomplish by requiring flow standards for all impounded streams rather than just DEP stocked streams, it once again left the whole issue of the grandfathered registrations to be dealt with another day. The unsuccessful 2006 proposed bill 5277 was one more attempt to do such. She commented that, similar to her predecessor Representative Mushinsky, she had been frustrated by her inability to successfully address the issue of registrations. It is evident that registrations still need to be considered, but within the context of a broader policy discussion on water allocation among all stakeholders.

Attempting to extend these regulations to groundwater and effectively taking away registered diversions will open the Department to legal challenges and does not serve the interest of the state or the regulated community.

The Department contends they have the legislative authority to regulate groundwater, and have acknowledged at public meetings that the proposed streamflow regulations may not have achieved the appropriate balance with regard to groundwater. In addition, they have indicated that they would be open to revise them. While we appreciate the DEP's willingness to explore modifications to the groundwater provisions of the proposed regulation, we cannot agree to such an approach. Connecticut Water Company must stand by its contention that the DEP does not have the statutory authority to regulate groundwater. Agreeing to any regulation of groundwater in this context would do irreparable harm to the State's regulatory process. Specifically, we cannot support the adoption of any regulation that we do not believe is statutorily allowed for. Furthermore, we would suggest that properly addressing appropriate groundwater regulation is simply not possible in the context of this particular rulemaking process.

Extending the regulations to groundwater has extensive impacts statewide with significant repercussions on water providers that rely, even in part, on groundwater sources. For some systems it will reduce their available supply by 50% and lead to immediate water use restrictions and moratoriums on development in the communities they serve. If the regulations were adopted as proposed, Connecticut Water's Guilford system would go from having sufficient supplies to meet our customers' needs to having a supply deficit for peak days and maximum month demands, even with an additional 1 million gallons a day available through an interconnection with our neighboring utility. We would expect the magnitude of impacts to be similar in other Connecticut Water systems where surface and groundwater supplies are similarly mixed.

Initial estimates of the costs for system modifications, new release structures, and new supplies to replace lost capacity are estimated for Connecticut Water's systems to be between $40 and $70 million. These costs would ultimately be borne by our customers in the form of higher rates. They would compete with other critical utility needs such as infrastructure replacement programs and water treatment projects. The estimated compliance costs equate to approximately 5 years of our typical infrastructure replacement budget of $12 -15 million per year. It would be more than double our total capital budget for all water treatment, distribution and information technology project investments. The majority of costs for compliance would likely be incurred in the initial year or two after a basin classification is assigned, even though advocates note that implementation of the regulations will be phased in. The compliance costs would not actually be extended out 10 to 15 years as suggested by many of the proponents.

Further, while there was robust discussion and work by the Technical Committee on the methodology for surface water supplies, there was less time or consensus on the method for groundwater supplies. The work on the groundwater model relied primarily on two studies, which our experts, Wittman Hydro Planning Associates, indicate may not be appropriate as the basis for regulation in Connecticut.

Proper and well thought out statutory authority must be adopted prior to the development of workable and meaningful groundwater regulations.

DEVELOPING FURTHER LEGISLATION

In order to respect the integrity of the legislative process, we have no alternative but to insist that the Department first secure the legislative authority for such regulation of groundwater. This would ensure that water resource policy in the state is set by legislators in the context of the broader public policy issues and not developed by regulators focused on their unique department objectives –without adequate consideration of the mandates and responsibilities of other regulatory authorities.

We don't disagree that groundwater withdrawals can affect streamflow and there have been some situations where those impacts have been evident. We would suggest, however, that if the Department feels the need to expand their authority to regulate groundwater, it is incumbent upon the agency to seek the appropriate legislative authority, not to try to achieve that through promulgation of regulations.

We are willing to work with the parties outside of this current regulatory process to develop legislation that would include groundwater supplies, provided it:

- has the appropriate balance and does not effectively rescind diversion registrations;
- includes a process to first screen basins in the state, using a model such as that recently developed by the University of Connecticut's Institute of Water Resources, and then identify a basis for which to identify those streams that would require compliance with new standards; and
- explicitly authorizes appropriate variances or exemptions that would be granted, independent of environmental standards, for situations when compliance with streamflow would interfere with a water utility's ability to meet the DPH requirements to have sufficient supplies to meet public health and safety with an adequate margin of safety.

<u>REALIZING THE ENVIRONMENTAL BENEFITS</u>

We believe the environmental goals of the Department would be better served if the groundwater provisions were eliminated from the proposed regulations and efforts instead focused on changes to the regulations to expand the minimum streamflow standards to apply to streams that are not stocked, as intended by the law. With such focus, it is likely consensus could be reached and the regulations could be adopted so the environmental benefits could be realized. Key areas that need to be addressed in revisions to the regulations for surface water impoundments include:

- a process and method for classifications and prioritization of streams to direct the efforts and financial resources first to the areas where there is known impairment or greatest risk of such and/or areas where immediate benefits could be realized with minimal impacts on the user. This can be done in two ways, both of which would be open public processes:
    - map the entire state and establish priorities based on that data for requiring compliance; or
    - focus initial mapping efforts on areas of known impairments, as identified by existing EPA and/or DEP programs or other stakeholder concerns.
- language throughout that allows for the appropriate consideration of the other factors as specified in the statute. The aspects pertaining to water companies and their ability

to meet their public health obligations cannot be done in a vacuum by the Department but would require input from the DPH. As such, language should be added that explicitly states that there is concurrence from DPH in on such aspects of the regulations.

- provisions to ensure a water utility's margin of safety would not be so adversely affected as to prevent the utility from satisfying the regulatory requirements for DPH or compromise their ability to serve their existing customers. It should include a mechanism to delay compliance or obtain special conditions or an exemption as authorized by the statute when compliance with streamflow would mean a utility would not satisfy their DPH regulatory obligations regarding sufficient supplies. This could be done with the condition that the utility demonstrate appropriate demand management measures, efforts to conserve supplies, and plans to pursue alternative supplies.

- consideration of other factors stipulated in the statute, when doing the mapping, for exemptions, etc. including:

    - needs and requirements for public health, safety, flood control, industry, public utilities, water supply, agriculture and other lawful uses; and
    - extent to which the flows are necessary to satisfy other regulatory requirements

PROVIDING GREATER CERTAINTY FOR THE REGULATED COMMUNITY

The regulations, as proposed, lack certainty for the regulated community. As a result, it is difficult to assess the impacts or anticipate what would be required for compliance. It makes it difficult for any of the stakeholders to have any reasonable level of certainty as to how the regulations will be applied. That ambiguity needs to be removed so that the path to compliance is clear including in the following areas:

- The language in the narrative standards regarding the basis for classification is vague and subjective, leaving great uncertainty for the regulated community. The difference in compliance obligations between a Class 2, 3 or 4 are substantial and greatly impact a utility and its customers. It is necessary to clarify the difference between terms such as "minimally altered, moderately altered and substantially altered" so the standards are consistently interpreted and applied, both initially and over time.

- Provisions should be incorporated that would allow for a legal appeal of a basin classification, rather than limiting the recourse to change a classification to a petition process by either party.

- The Department has repeatedly assured water utilities that water company supplies would likely be Class 3 or perhaps a Class 4 depending on the circumstances. If that is the case, the regulations should be revised to include specific language to that effect, with some petition process if it there were compelling reasons to consider otherwise.

- The compliance requirements for various specific utility scenarios (sequence of storage vs distribution reservoirs) are not clear and even DEP has not been able to definitively indicate how those situations should be addressed. While those might have been addressed through the stakeholder process if that had been continued , the process of exploring those various scenarios needs to be continued and language incorporated into the regulations to more clearly define the requirements in those different situations.

SUMMARY

We recognize the value of water and know we have a responsibility to be good stewards of this resource. We understand that water is a renewable resource and have a commitment to water's protection, preservation and efficiency of use to ensure its sustainability and availability for future generations. We are concerned that the proposed streamflow regulations address the environmental concerns but do not adequately balance the other lawful uses as required by the statute.

Without significant changes to the regulations, such as detailed in this testimony and that of the Connecticut Water Works Association, compliance would compromise Connecticut Water Company's ability to meet our obligations as public water suppliers to our customer and the communities we serve and to comply with other regulatory programs. The release requirements and withdrawal limitations would reduce available supplies such that it would result in water use restrictions and moratoriums on development in systems in some of the communities we serve. The costs to comply with the regulations are staggering. While any environmental benefits would be enjoyed by residents throughout the state, the costs would fall primarily on water utility customers. These increased costs, however, would not provide any direct benefit to the customers' water quality or service.

We urge the Commissioner to consider our comments and further revise the proposed regulations so they are consistent with the legislative mandate and provide the appropriate balance between environmental needs and other lawful uses. We would suggest that without substantive changes, it will be left to the legislature's Regulations Review Committee to judge the legislative intent and assess the reasonableness of such a regulatory to balance the competing needs and meet the legislative mandate.

While we cannot support the regulations as proposed, Connecticut Water remains available to work with the Department and other stakeholders to develop sound, appropriate regulations.

Sincerely,

Maureen P. Westbrook
Vice President, Customer and Regulatory Affairs

MURTHA

MEMORANDUM

PRIVILEGED AND CONFIDENTIAL
ATTORNEY WORK PRODUCT

TO: David Radka

FROM: Gregory A. Sharp, Esq. GA Sharp, Esq

DATE: December 1, 2009

RE: Legislative History of P.A. 05-142

I. Introduction.

In connection with the recently proposed streamflow regulations, you have asked us to research the intent of the legislature in adopting Public Act 05-142, An Act Concerning the Minimum Water Flow Regulations, to determine whether the legislature intended to include regulation of groundwater wells within the scope of the Act. P.A. 05-142 is attached as Attachment A.

The specific question is whether the Act's language, which amended a previous statute authorizing streamflow regulations, was intended by the legislature to authorize the DEP to regulate wells registered under the Water Diversion Policy Act, as DEP claims, or whether it intended only to extend the reach of the previous regulation, which applied only to impoundments and surface diversions, from those on rivers and streams stocked with fish by DEP to impoundments and surface diversions on all rivers and streams.

The currently proposed regulations exempt from the streamflow requirements groundwater and surface water diversions which have received permits, but they seek to regulate registered groundwater withdrawals and surface water diversions, the former through limitations imposed on registered well use, the latter through releases of water from reservoirs.

To answer the question, it is necessary to consult the rules of statutory construction applicable when a court interprets a statute, as well as to review the legislative history of the statute.

II. Rules of Statutory Construction.

The primary rule used by our state courts for determining the meaning of a statute is summarized in Conn. Gen. Stat. § 1-2z, which provides that:

> "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extra-textual evidence of the meaning of the statute shall not be considered."

Since the 2005 legislation amended an earlier statute, An Act Concerning Instantaneous Minimum Flow of Rivers and Streams, adopted in 1971 (P.A. 71-229) and codified at Conn. Gen. Stat. § 26-141a et seq., it is necessary to consider the language of the original statute and the regulations adopted thereunder to divine what changes the legislature intended to make to the previous regulatory scheme.

In addition, because the legislature had adopted the Water Diversion Policy Act in 1982 (Conn. Gen. Stat. § 22a-365 et seq.) which provided a separate regulatory scheme applicable to the same general subject matter, that statute must also be consulted to determine the interplay, if any, between the two.

A. 1971 Streamflow Statute

The original streamflow statute authorized the Water Resources Commission, predecessor to DEP, to adopt regulations setting forth standards concerning the flow of rivers and streams stocked with fish by the State. Attachment B.

The original legislation provided:

> "Whenever any dam or other structure is maintained in this state which impounds, or diverts, the waters of a river or stream which is stocked with fish by the state board of fisheries and game, or which dam or other structure affects the flow of water in such a stocked river or stream, the water resources commission may promulgate regulations setting forth standards concerning the flow of such water in accordance with Section 2 of this Act."[1]

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[1] References in the statute to the water resources commission and the state board of fisheries and game were replaced by references to the commissioner of the department of environmental protection by P.A. 71-872, S. 441.

Section 2 of the Act provided the factors for consideration in establishing the standards, one of which was "the natural flow of water into an impoundment or diversion...." (Emphasis added). The Act contained no language indicating that consideration should be given to the impact of wells on natural flows, or that wells would fall within the ambit of the regulations to be adopted. In fact wells are not mentioned anywhere in the statute.

B. 1979 Streamflow Regulations

In 1979, the DEP adopted the regulations required by the Act ("streamflow regulations"). See Attachment C. Section 26-141a-2 provided the jurisdictional definitions upon which the regulations turn. They define "diversion" and "impoundment" but not "structure," or "other structure." Diversion is defined as "a structure which removes water from a watercourse, which does not return substantially all of the water so removed directly and promptly to such watercourse." Impoundment is defined as "a dam, dike, reservoir, or other structure, constructed to seize and hold water by effectively blocking the flow of a watercourse." As in the enabling statute, there is no mention of wells.

Section 26-141a-6 of the regulations provides the flow requirements applicable to diversions and impoundments located on watercourses which are listed in an annual publication by the Commissioner of stocked watercourses. The flow requirements themselves are expressed in terms of "Daily Average Releases in Cubic Feet per Second per Square Mile of Drainage Area." As such, they apply exclusively to impoundments or diversions of surface waters from which releases can be generated to increase downstream flows to protect and maintain the fish stocked in the streams, other aquatic organisms, wildlife and recreation, consistent with other lawful uses of such waters as provided by Section 2 of the Act.

It is clear that the jurisdictional language of the original statute applicable to "any dam or other structure which impounds, or diverts, the waters of a river or stream ..., or which dam or other structure affects the flow of water" was not applied by the Commissioner to encompass groundwater wells, but only to various types of surface water diversions and impoundments. These regulations were accepted by the Regulations Review Committee of the General Assembly, and became final on April 24, 1979. Since 1979, the regulations have remained unchanged.

C. 1982 Diversion Act

Shortly after the promulgation of the streamflow regulations, the legislature adopted the Connecticut Water Diversion Policy Act (P.A. 82-402), which for the first time in Connecticut created a regulatory water allocation scheme. Unlike the streamflow regulations, the Act applied to diversions from both surface water and groundwater. It required that a permit be obtained for any diversion of more than 50,000 gallons per day initiated after the effective date of the Act. It provided a one year registration period for existing surface water and groundwater diversions, provided

the diverter could provide documentation of the quantity sought to be registered. Registered sources were exempt from the permit requirements of the Act. Conn. Gen. Stat. § 22a-368(a).

The legislature defined "diversion" very differently than the DEP had defined it just three years earlier in the 1979 streamflow regulations. While the latter defined it in terms of "a structure which removes water from a watercourse, which does not return substantially all of the water so removed directly and promptly to such watercourse...," the Diversion Act defined it as "any activity which causes, allows or results in the withdrawal from or the alteration, modification or diminution of the instantaneous flow of the waters of the state...." Moreover, "waters" were defined to include "underground streams, bodies or accumulations of water...." Conn. Gen. Stat. § 22a-367. However, nothing in the Diversion Act by its terms altered or amended the streamflow statute.

D. <u>2005 Amendments to Streamflow Statute</u>

The language in the 2005 amendments to § 26-141a reads as follows: "Whenever a dam or other structure is maintained in this state which impounds, or diverts, the waters of a river or stream [which is stocked with fish by the Commissioner of Environmental Protection,] or which dam or other structure affects the flow of water in such a [stocked] river or stream the [commissioner] Commissioner of Environmental Protection may [promulgate] <u>adopt</u> regulations, <u>in accordance with the provisions of Chapter 54,</u> setting forth standards concerning the flow of such water in accordance with Section 26-141b, <u>as amended by this Act</u>." Deletions are indicated by brackets. Additions are indicated by underlining.

The amendments to Section 26-141b made various changes not relevant to the issue at hand, retained the requirement to consider "the natural flow of water into an impoundment or diversion," but added no new language concerning the consideration of groundwater or wells which might impact surface flows. With respect to the regulations themselves, it changed the statutory charge from one directing the commissioner to adopt regulations establishing "instantaneous minimum flow standards and regulations for all stocked river and stream systems" to one which directed her to adopt "regulations establishing flow regulations for all river and stream systems."

Taken together, the textual changes to the scope of the authority granted to the Commissioner indicate only that the regulations should reach all streams and rivers not just those stocked by the Commissioner, and they should go beyond instantaneous minimum standards to more generic flow regulations Nothing in the text of the amendments suggests that the prior regulation, which interpreted the jurisdictional language concerning "any dam or other structure" in the original statute as applying only to dams and surface impoundments, should be expanded to add wells to the list of structures to be regulated.

Although arguments could be made under the "plain language" rule of statutory interpretation that the phrase "other structure which alters the flow of water" could be

construed to mean a well, an analysis of the relevant statutory and regulatory language indicates that was not what the legislature intended.

The fact that: 1) the original 1971 jurisdictional language of Conn. Gen. Stat. § 26-141a remained the same, except for the deletion of references to stocked streams and rivers, 2) the Department had interpreted those same words in 1979 to apply only to surface waters, 3) the language in § 26-141b requiring the commissioner to consider the natural flow of water into an impoundment or diversion remained the same, and 4) no new language concerning consideration of groundwater flows supplying wells or the impact of withdrawals from groundwater affecting stream flows was added in the amendments, when considered together, support the conclusion that the language of the statute itself was clear that it did not constitute a new grant of authority to regulate wells drawing from groundwater, even if those wells did, in fact, affect the flow of water in a given river or stream.

However, if a court confronted by the question was not satisfied with this reading, due to the potential ambiguity surrounding whether a groundwater well is a "structure which alters the flow of water," it is likely that a reviewing court then would look to the actual floor debates and committee hearings for guidance.

III. Legislative History of the 2005 Amendments to the 1971 Streamflow Legislation

As noted above, the legislature re-visited the issue of streamflow regulation in 2005. The legislation was prompted by the Shepaug litigation. That case involved an attempt by Waterbury to have its rights to waters of the Shepaug River impounded by a dam adjudicated in a declaratory judgment action. The City had impounded the river many years before for public water supply purposes and registered its diversion under the Diversion Act. The defendants, downstream water users, including the towns of Washington and Roxbury, sought increased flows from the impoundment.

Initially, the defendants prevailed in the trial court. On appeal, the Supreme Court held that Waterbury had established a prescriptive easement to the water as a matter of law. (City of Waterbury v. Town of Washington, 260, Conn. 506 (2002)). As to the remaining issues, the Supreme Court remanded the case to the trial court with instructions to decide three questions: 1) whether the defendants possessed riparian rights with respect to the flows downstream of the dam, or had their common-law riparian rights been superseded by the Diversion Act, 2) whether the legislature had intended to allow holders of riparian rights to retain their common law remedies against holders of registered diversions under the Diversion Act, and 3) if the defendants retained their riparian rights with respect to registered diversions post-Diversion Act, what standard should be applied to an examination of whether Waterbury had violated those rights. The parties settled following the remand, so the questions were never answered.

As the legislative history makes clear, the settlement of the Shepaug litigation paved the way for the legislature to take up the streamflow issue. The testimony at the

legislative hearings, and the floor debates on the 2005 amendments to Conn. Gen. Stat. § 26-141a-c are instructive as to the purpose and breadth of the amendments.

The initial Raised Bill No. 1294 proposed the repeal of the entire first section of the prior statute, which contained the jurisdictional language previously discussed, and proposed the substitution of very broad language defining "diversion" and "divert" to include any activity which changed the instantaneous flow of the "waters of the state," which were likewise defined very broadly. See Attachment D. While such broad language would have presumably included groundwater wells, this initial language was stripped from the legislation following the public hearing before the Environment Committee.

At the hearing, the bill's sponsor, Senator Roraback, who represented the Senate District which included the Shepaug River basin and two of the towns which were parties to the litigation, testified in response to a question about the bill's effect on hydropower projects:

> "Typically, this issue is not one that's centered around hydropower issues. It's more an issue of public drinking-water supply reservoirs and maintaining an adequate supply of water behind impoundments, while at the same time ensuring that the river downstream of those impoundments doesn't dry up and lose all its environmental attributes." Conn. Joint Standing Comm. Hearings, Environment Comm., Pt. 11, 2005 Sess., at 3462.

He then further elaborated the goal of the legislation, saying:

> "when we at long last come to a uniform set of standards governing releases from impoundments into our streams, it's going to enable, most importantly, the rivers to be the healthiest they can be." Id. at 3463.

Finally, he concluded by saying:

> "So we really need to strike the balance between ensuring a safe and adequate supply of public drinking water, while at the same time allowing any water that's not needed for that purpose to make its way downstream, as it would were the impoundment not there." Id.

Testimony from Deputy Commissioner Jane Stahl of DEP favored an interim approach to the problem by setting standards for releases using the recently developed Apse method, a method which had been promoted by DEP within the past few years as a means to calculate streamflows considered to be protective of riverine ecosystems. The water industry testimony generally opposed the bill, primarily because the version presented at the public hearing would have eliminated considerations of water supply needs from the factors to be weighed by the Commissioner in adopting the new regulations.

The bill was then substantially revised and came out of the Environment Committee as Substitute Bill No. 1294. (Attachment E) It restored the original jurisdictional language of Section 26-141a, but deleted the previously limiting references to rivers and streams "stocked with fish by the Commissioner," so that it applied to all rivers and streams. The OLR Bill Analysis Summary that accompanied the bill stated:

> "Under current law, the Department of Environmental Protection (DEP) commissioner has the authority to set minimum flow standards for rivers and stream (1) where a dam or other structure impounds or diverts the flow, and (2) that she stocks with fish. The bill (1) authorizes (the Commissioner) to adopt water flow regulations for all diverted or impounded rivers and streams, regardless of whether she stocks them, and (2) requires her to do so by December 31, 2006." Conn. Gen. Assem., Office of Legis. Research, Bill Analysis for sSb 1294.

The bill subsequently came up on the Senate calendar, and was given File No. 354. Attachment F. The Senate referred the bill to the Public Health Committee, which gave it a joint favorable vote. Attachment G.

The Senate then amended the bill retaining the core language of § 26-141a, but deleting the references to stocked streams, and adding a provision that the regulations would be adopted in accordance with the Chapter 54 of the General Statutes (Uniform Administrative Procedures Act). Attachment H. The language in § 26-141b concerning the factors for consideration by the Commissioner in adopting the regulations retained the directive to consider "the natural flow of water into an impoundment or diversion, and being reasonably consistent therewith...." The bill as amended makes no reference to wells or groundwater.

On the floor of the Senate, Senator Stillman, the Senate co-chair of the Environment Committee, introduced the amended bill by saying "What this does is that it puts in place an opportunity for the Department of Environmental Protection to adopt regulations to set stream flow not standards, but to regulate the flow of all our streams in Connecticut." 48 Conn. Sen. Proc., Pt. 6, 2005 Sess. at 1906.

Senator Roraback thanked Senator Stillman for her leadership on the issue, referenced the Shepaug litigation, and said: "...the resolution of that litigation enables us now to focus on the creation of a statewide policy governing the appropriate level of release from impoundments in this state to keep our streams healthy." Id. at 1908.

Senator Stillman was given the opportunity to remark further on the bill and said "Yes, thank you. Just one more remark. Mr. President. I just want to make it clear that this is not a water diversion bill. It strictly addresses stream flow. Thank you." Id. at 1910.

Both the amendment and the amended bill passed. The debate on the amended bill included no discussion of the bill conferring new authority on the Commissioner to regulate wells as part of the streamflow regulatory process.

The OLR Bill Analysis Summary of the Senate Amendment states:

> "The bill requires the Department of Environmental Protection (DEP) commissioner to revise minimum flow regulations for all rivers and streams where a dam impounds or diverts the water flow. It expands the scope of these regulations to all such rivers and streams, rather than just those that DEP has stocked with fish. She must revise the regulations by December 31, 2006." Conn. Gen. Assem., Office of Legis. Research, Bill Analysis for SB 1294, as amended by Senate A.

The amended bill was then forwarded by the Senate to the House. It was forwarded in turn to the Planning and Development Committee, the Committee on Energy and Technology, and the Judiciary Committee, all of which reported the bill out favorably.

On the floor of the House, Representative Mushinsky advocated for adoption of the bill as amended by the Senate and responded to numerous questions from her colleagues as to how the bill would apply in various situations, including diversions subject to existing permits or otherwise registered.

On the basic purpose of the bill, she said:

> "...the problem with current law is it's a spotty law. It only applies when a stream has been artificially stocked by DEP. It does not apply when it hasn't been stocked, so that is why people have to go to court and fight these things out, and what we'd like to have is one standardized system throughout the state that takes care of the competing needs in an orderly way." 48 Conn. H.R. Proc., Pt. 21, 2005 Sess., at 6228.

In the extensive questioning that followed, which included numerous references to the 1982 Water Diversion Policy Act and the impact of the proposed streamflow legislation on permits and registrations granted under that statute, Representative Minor asked about DEP's powers to make water allocation decisions in the context of the bill being discussed.

Representative Mushinsky's answer was:

> "This bill is not revisiting existing diversions. We're just cleaning up the law at this point. You know, that question is going to come up in the future and we will have to address it, but it doesn't come up in today's bill...." Id. at 6245.

In response to a follow-up question from Representative Miner about applying the regulations to streams not currently stocked, she replied:

> "The purpose of this bill is to make it a universal system. The hypothetical question you asked, Representative Miner, has to do with a problem with the existing grandfathered permits, and that's going to sooner or later have to be addressed." Id. at 6246.

Apparently not satisfied, Representative Miner asked whether the intention is to apply streamflow regulations to every river and stream in the state, and she replied "Yes, our intention is to include all of them, even the ones that are not artificially stocked." Id. at 6248.

He then asked: "And so when we finish doing this evaluation of stream flow, and the Department looks at uses along that river system, is it fair to say that nothing will be done until it gets revisited by the Legislature?"

Representative Mushinsky responded: "...the '82 law gave people grandfathered diversions, and DEP just can't take them away unilaterally. This is going to have to be revisited again...." Id. at 6248.

The amended Senate bill was ultimately passed by the House, and the legislation became Public Act 05-142. The OLR Analysis Summary of the Public Act states: "The Act requires the Department of Environmental Protection (DEP) commissioner to revise water flow regulations for all rivers and streams where a dam impounds or diverts the water flow. It expands the scope of the regulations to all such rivers and streams, rather than just those DEP has stocked with fish. She must revise the regulations by December 31, 2006." Conn. Gen. Assem., Office of Legis. Research, Bill Analysis for P.A. 05-142.

It clearly appears from the legislative history that the legislature did not intend to provide DEP with the authority either to extend the scope of the streamflow regulations beyond releases from surface impoundments and diversions, or to re-open registered diversions, whether they be ground water or surface water diversions. The intent, as articulated by the proponents of the bill, was simply to expand the coverage of the previous streamflow regulation to all streams and rivers, not just those stocked by DEP, and to make minor changes with respect to the applicability of the Administrative Procedure Act, the factors for consideration in adopting the regulations, and other housekeeping matters not relevant to the scope of the regulatory scheme.

Adding support to the conclusion that the legislature never intended to reopen registered ground water or surface water diversions by amending the streamflow legislation in 2005 is the fact that, in the next legislative session, the Department introduced a bill to do just that. In September of 2005, a stretch of the Fenton River went dry, partially in response to the pumping of registered wells near the river by the University of Connecticut when students returned to campus for the fall semester. The

incident sparked statewide news coverage and photographs of stranded fish were widely circulated.

In the winter of 2006, the Department offered a bill to amend, not the streamflow statute, but the Diversion Act itself with extensive revisions focused on providing the Commissioner with unambiguous authority to reopen non-agricultural registered diversions, along with procedures for hearings and appeals of decisions on such reopeners. An Act Concerning Preservation of Rivers and Streams, H.B. 5277, Feb. Sess. (2006). The Environment Committee held hearings on the bill and gave it a Joint Favorable vote, but it died in the Planning and Development Committee. 112 Conn. H.R.J., Pt. 1, 2006 Sess., at 506.

The DEP testimony on that bill makes clear that, as of 2006, the Department did not believe it had the authority to do what it is now proposing, i.e., reopening registered groundwater diversions by regulating the use of pre-existing wells to further the Department's streamflow goals. The written Testimony submitted by Commissioner Gina McCarthy at the Environment Committee Public Hearing on February 22, 2006 (Attachment H) states in relevant part:

> "Without the ability for the [state] to properly safeguard [the riverine environment], the potential for streams to dry up as registrations are more fully utilized continues to increase each day the issue of registered diversion is not adequately addressed...."
>
> "Without the authority to place controls on the use and withdrawal of water taken pursuant to registered diversions, we cannot implement an equitable allocation system. In addition, while the Department may be able to limit adverse impacts caused by permitted diversions, we are unable to do anything about the degradation of Connecticut's waters caused by registered diversions...."

Finally, in a dispassionate review, a recent law review article by a University of Connecticut law student Scott Simpson titled "Forging Connecticut's Water Policy Future: Registered Diversion, Riparian Rights and the Courts after Waterbury v. Washington" delves deeply into some of these issues. On the question of registered diversions, he concludes as follows:

> "Ultimately, legislative efforts to bring registered diversions under the state's regulatory authority have failed. Although a plain reading of the state's minimum streamflow statute could suggest otherwise, the overwhelming extratextual evidence indicates that registered diversions are still exempt from regulation." Scott B. Simpson, Forging Connecticut's Water Policy Future: Registered Diversions, Riparian Rights and the Courts after *Waterbury v. Washington*, 8:2 CONN. PUB. INTEREST L. J., 85, 112 (2009).

Simpson's scholarly analysis lends further support to the notion that a neutral third party, such as the legislative Regulations Review Committee, or a court would

reach the same conclusion that the streamflow amendments did not authorize the Department to re-open registered groundwater diversions.

Implications for the Next Steps in the Process

The foregoing summary should be useful in the current multi-step process of rulemaking spelled out by the Administrative Procedure Act, Conn. Gen. Stat. § 4-168 through 173, and the Department's Rules of Practice, Conn. Agencies Regs. § 22a-3a-3.

The process provides interested parties the opportunity to offer written and oral comments on the proposed regulations to a DEP hearing officer. The Rules require that the Department then prepare the final wording of the regulation, a statement of the principle reasons in support of the regulation, a statement of the principal considerations raised in opposition to the regulation in the comments and the reasons for rejecting such considerations, and a revised fiscal note, as necessary.

At the agency level, therefore, submission of comments for stakeholders that provide a legal analysis focused on legislative intent may persuade the Department to modify the regulations to limit their scope to apply only to releases from dams and impoundments. If not, the agency will have to respond to the comments for the record.

The regulations are then put in final form and submitted to the Office of the Attorney General for a determination of legal sufficiency. Upon approval of the regulations by the Attorney General, the regulations are submitted to the standing legislative regulations review committee of the General Assembly. The committee may, in its discretion, hold public hearings on the regulation, and may approve, disapprove or reject without prejudice, in whole or in part, any such regulation.

Interested parties may discuss their views of proposed regulations with members of the committee, provided that the requirements of the lobbying statutes are followed. The contents of the foregoing memo may be useful in addressing negative responses by the Department in the event that revisions of the proposed regulations are not adopted by the agency. In particular, the comments from Representative Mushinsky, Senator Stillman and Senator Roraback may prove more persuasive to fellow legislators than to the Department.

Finally, the foregoing analysis would be helpful in mounting an attack on the regulations, should DEP decide not to narrow their scope and the regulations review committee approves them. Section 4-176 of the General Statutes provides that any person may petition an agency for a declaratory ruling as to the validity of a regulation. If the agency issues a ruling adverse to the petitioner, an appeal to Superior Court under Section 4-183 of the General Statutes may be taken from the agency's decision. Under Section 4-175 of the General Statutes, if the agency declines to issue a ruling, the petitioner may seek a declaratory judgment in Superior Court as to the validity of the regulation.

In either event, the foregoing would provide the backbone for the analysis incorporated in a brief whether on appeal from an adverse ruling on a petition for declaratory ruling, or in support of a declaratory judgment action brought directly to court.

A

Attachment A

Substitute Senate Bill No. 1294

Public Act No. 05-142

AN ACT CONCERNING THE MINIMUM WATER FLOW REGULATIONS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 26-141a of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2005*):

Whenever any dam or other structure is maintained in this state which impounds, or diverts, the waters of a river or stream [which is stocked with fish by the Commissioner of Environmental Protection,] or which dam or other structure affects the flow of water in such a [stocked] river or stream, the [commissioner] Commissioner of Environmental Protection may [promulgate] adopt regulations, in accordance with the provisions of chapter 54, setting forth standards concerning the flow of such water in accordance with section 26-141b, as amended by this act.

Sec. 2. Section 26-141b of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2005*):

The Commissioner of Environmental Protection shall, on or before [July 1, 1973] December 31, 2006, and after consultation and cooperation with the Department of Public Health, the Department of Public Utility Control, an advisory group convened by the Commissioner of Environmental Protection, and any other agency, board or commission of the state with which said commissioner shall deem it advisable to consult and after recognizing and providing for the needs and requirements of public health, flood control, industry, public utilities, [and] water supply, public safety, agriculture and other lawful uses of such waters and further recognizing and providing for stream and river ecology, the requirements of natural aquatic life, natural wildlife and public recreation, and after considering the natural flow of water into an impoundment or diversion, and being reasonably consistent therewith, [and also after thirty days' notice in the Connecticut Law Journal and after thirty days' notice sent by certified mail to all persons, firms and corporations known to have a direct interest, hold a public hearing and, not earlier than thirty days thereafter,] shall [promulgate] adopt regulations, in accordance with the provisions of chapter 54, establishing [instantaneous minimum] flow [standards and] regulations for all [stocked] river and stream systems. Such [instantaneous minimum] flow [standards and] regulations shall: (1) Apply to all river and

Attachment A

stream systems within this state; [which the commissioner finds are reasonably necessary to keep a sufficient flow of water to protect and safely maintain the fish placed therein by him pursuant to his stocking program;] (2) preserve and protect the natural aquatic life, including anadromous fish, contained within such waters; (3) preserve and protect the natural and stocked wildlife dependent upon the flow of such water; (4) promote and protect the usage of such water for public recreation; (5) be [consistent with] based, to the maximum extent practicable, on natural variation of flows and water levels while providing for the needs and requirements of public health, flood control, industry, public utilities, water supply, public safety, agriculture and other lawful uses of such waters; and (6) be based on the best available science, including, but not limited to, natural aquatic habitat, biota, subregional basin boundaries, areas of stratified drift, stream gages and flow data, locations of registered, permitted, and proposed diversions and withdrawal data reported pursuant to section 22a-368a, locations where any dams or other structures impound or divert the waters of a river or stream and any release made therefrom, and any other data for developing such regulations or individual management plans. Such flow regulations may provide special conditions or exemptions including, but not limited to, an extreme economic hardship or other circumstance, an agricultural diversion, a water quality certification related to a license issued by the Federal Energy Regulatory Commission or as necessary to allow a public water system, as defined in subsection (a) of section 25-33d, to comply with the obligations of such system as set forth in the regulations of Connecticut state agencies. Any flow management plan contained in a resolution, agreement or stipulated judgment to which the state, acting through the Commissioner of Environmental Protection, is a party, or the management plan developed pursuant to section 3 of public act 00-152, is exempt from any such flow regulations. Flow regulations that were adopted pursuant to this section and sections 26-141a and 26-141c, as amended by this act, prior to the effective date of this section, shall remain in effect until the Commissioner of Environmental Protection adopts new regulations pursuant to this section.

Sec. 3. Section 26-141c of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2005*):

After the [promulgation of the aforesaid minimum flow standards,] adoption of regulations pursuant to section 26-141b, as amended by this act, no person [, firm or corporation] or municipality, as defined in section 22a-423, shall maintain any dam or structure impounding or diverting water within this state except in accordance with [such standards and] regulations as established by [said commissioner] the Commissioner of Environmental Protection. If the commissioner finds that any person [, firm or corporation] or municipality, as defined in section 22a-423, is violating such [minimum flow standards] regulations, the commissioner shall issue an order to such person [, firm or corporation] or municipality to comply with [his] the regulations. The order shall include a time schedule for the accomplishment of the necessary steps leading to compliance. If such person, or municipality [firm or corporation] fails thereafter to comply with the [standards and] regulations concerning [minimum] flow of water, the commissioner [is empowered to] may request the Attorney General to bring an action in the Superior Court to enjoin such person [, firm or corporation] or municipality from restricting the flow of such water in accordance with such [standards and] regulations.

Attachment A

Approved June 24, 2005

B

Attachment B

Substitute House Bill No. 5811

PUBLIC ACT NO. 229

AN ACT CONCERNING INSTANTANEOUS MINIMUM FLOW OF RIVERS AND STREAMS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Whenever any dam or other structure is maintained in this state which impounds, or diverts, the waters of a river or stream which is stocked with fish by the state board of fisheries and game, or which dam or other structure affects the flow of water in such a stocked river or stream, the water resources commission may promulgate regulations setting forth standards concerning the flow of such water in accordance with section 2 of this act.

Sec. 2. The water resources commission shall, on or before July 1, 1973, and after consultation and cooperation with the state board of fisheries and game, the state department of health, the public utilities commission and any other agency, board or commission of the state with which said water resources commission shall deem it advisable to consult and after recognizing and providing for the needs and requirements of public health, flood control, industry, public utilities and water supply, and further recognizing and providing for stream and river ecology, the requirements of aquatic life, natural wild life and public recreation, and after considering the natural flow of water into an impoundment or diversion, and being reasonably consistent therewith, and also after thirty days notice in the Connecticut Law Journal and after thirty days notice sent by certified mail to all persons, firms and corporations known to have a direct interest, the water resources commission shall hold a public hearing and, not earlier than thirty days thereafter, shall promulgate regulations establishing instantaneous minimum flow standards and regulations for all stocked river and stream systems. Such instantaneous minimum flow standards and regulations shall: (1) Apply to all river and stream systems within this state which the water resources commission and the state board of fisheries and game find are reasonably necessary to keep a sufficient flow of water to protect and safely maintain the fish placed therein by the state board of fisheries and

Attachment B

Bill No. 5811

NO. 229

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game pursuant to its stocking program; (2) preserve and protect the natural aquatic life, including anadromous fish, contained within such waters; (3) preserve and protect the natural and stocked wildlife dependent upon the flow of such water; (4) promote and protect the usage of such water for public recreation; (5) be consistent with the needs and requirements of public health, flood control, industry, public utilities, water supply, public safety, agriculture and other lawful uses of such waters.

Sec. 3. After the promulgation of the aforesaid minimum flow standards, no person, firm or corporation shall maintain any dam or structure impounding or diverting water within this state except in accordance with such standards and regulations as established by said water resources commission. If the water resources commission finds that any person, firm or corporation is violating such minimum flow standards, the commission shall issue an order to such person, firm or corporation to comply with its regulations. The order shall include a time schedule for the accomplishment of the necessary steps leading to compliance. If such person, firm or corporation fails thereafter to comply with the standards and regulations concerning minimum flow of water, the water resources commission is empowered to request the attorney general to bring an action in the superior court to enjoin such person, firm or corporation from restricting the flow of such water in accordance with such standards and regulations.

Approved May 22, 1971

C

Attachment C

Minimum Stream Flow Standards

Sec. 26-141a-1. Title

These regulations shall be known as the Minimum Stream Flow Standards and Regulations of the Connecticut Department of Environmental Protection.

(Effective April 24, 1979)

Sec. 26-141a-2. Definitions

As used in these regulations,

(a) "Commissioner" means the Commissioner of Environmental Protection.

(b) "Calendar month water surface elevations" is a listing of the pond elevations at the first of each calendar month which have occurred or would result from historical flows, the available storage, and the current demand.

(c) "Discharge device" means any gate, valve, pipe, spillway, tainter gate, flashboard, tailrace or similar means of conducting water from above an impoundment or diversion to the watercourse below.

(d) "Diversion" means a structure which removes water from a watercourse, which does not return substantially all of the water so removed directly and promptly to such watercourse. Diversions shall include, but are not limited to, structures used for water supply, irrigation, industrial use, power production, and recreation. Diversions shall not include combined impoundment diversion structures which shall be classified instead as impoundments.

(e) "Drainage area" means that portion of the watershed upstream from the subject structure which catches and conveys all runoff to the structure.

(f) "Impoundment" means a dam, dike, reservoir, or other structure, constructed to seize and hold water by effectively blocking the flow of a watercourse. Impoundments shall include, but are not limited to, structures used for water supply, industrial use, power production and recreation. Impoundments shall not include small retaining walls constructed for the sole purpose of keeping diversion pipes or structures submerged or dry flood control dams, but shall include all other combined impoundment-diversion structures.

(g) "Operator" means any person who, or the responsible administrative or executive officer of any organization which owns, operates, or proposes to construct any impoundment or diversion on a stocked river or stream system within the State.

(h) "Release" means any discharge by means of a valve, gate, penstock, pipe, spillway, flashboard, turbine, or from leakage, seepage, condensation, precipitation on the structure, or from any source which becomes part of the flow downstream of the structure.

(i) "Safe yield" means the maximum continuous supply which can be anticipated from the watershed with the available storage during a period of years in which occurs a year as dry as one in twenty.

(j) "Stocked watercourse" means any watercourse and its tributaries into which the Commissioner or his agent shall have ordered or directed to be placed therein any species of trout, charr, salmon or their hybrid, or any other commercial or game fish, regardless of age or size.

(k) "Water supply emergency" means a combination of climatological water demand, water quality, or structural problems which could cause a grave situation which these regulations could worsen or which their suspension could help alleviate.

(Effective April 24, 1979)

Attachment C

Sec. 26-141a-3. Jurisdiction

(a) These regulations shall apply to any dam or other structure which impounds, or diverts waters, located on those watercourses which are listed in an annual publication by the Commissioner of stocked watercourses and their tributaries, or parts thereof, the flow of which he finds reasonably necessary to the protection and maintenance of such stocking, which are in operation on the effective date of these regulations or which subsequently commence operation.

(b) Except that the following impoundments and diversions shall be exempt from these regulations:

(1) those at locations with drainage areas of less than three (3) square miles in area;

(2) government operated flood control dams;

(3) those which discharge directly or through a stream less than one mile in length into a reservoir, lake, pond, or tidal waters unless the Commissioner has found that such stream has a unique value to the natural or stocked wildlife;

(4) those which return substantially all the daily inflow to the same watercourse in the immediate vicinity or in the case of existing impoundments and diversions, in the locations where releases normally occur;

(5) those which have no capability of controlling the discharge; and

(6) those exempted by action of the Commissioner under Section 26-141a-4.

(c) Compliance with these regulations shall not affect, impair, or infringe upon any property or contractual rights which may have existed prior to the effective date of these regulations and which require greater releases.

(Effective April 24, 1979)

Sec. 26-141a-4. Variances

(a) The operator of any diversion or impoundment or any person who proposes to construct a diversion or impoundment may petition the Commissioner at any time for an exemption or variance for any such structure from the minimum flow and freshet release standards of these regulations. The petition shall contain information sufficient to allow the Commissioner to give adequate consideration to the effect, in terms of the factors enumerated below, of the operation of the structure under such an exemption or variance on the stocked river or stream system in question. The Commissioner may require additional information prior to acting on such a petition. Notice of the granting of an exemption or a variance shall be published in a newspaper of general circulation in the municipality or municipalities wherein the affected structure or river or stream system is located.

In determining whether to grant an exemption or variance under this section, upon receipt of a petition from the operator of an impoundment or diversion, the Commissioner shall include, but is not limited to, consideration of whether operation of the structure will:

(1) Prevent the maintenance of viable pools, channels, or other water basins, or allow their undue depletion by normal evaporation and aquifer absorption;

(2) Reduce oxygen content below minimal levels, cause stagnation, or inhibit reproductive cycles (where that potential exists);

(3) Prevent the preservation, protection and safe maintenance of the river and stream stocking program, the natural aquatic life contained in such waters (including anadromous fish), and the natural or stocked wildlife dependent upon the flow of such water, and the availability of such water for public recreational uses; or

(4) Meet the needs and requirements for public health, flood control, industry, public utilities, water supply, water quality, electric power production, public safety, agriculture, and other lawful uses of such waters.

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Any such exemption or variance may be revoked, after a hearing at which the operator shall have an opportunity to present evidence in support of retention of the exemption or variance, if the Commissioner finds, upon consideration of the factors enumerated above in this section, that there exists a change in the conditions surrounding, or manner of operation of, the diversion or impoundment, sufficient to materially and adversely alter the circumstances under which such exemption or variance was granted.

(b) Upon the receipt of a petition or request for the declaration of a water supply emergency from any operator, from the chief executive officers of municipalities wherein the affected structure or the impaired stocked river or stream system is located, from the State Commissioner of Health, and Public Utilities Control Authority, or upon the receipt of any information from a recognized authority that an emergency exists or may be likely to exist in the immediate future, the Commissioner shall immediately commence departmental proceedings to determine the nature and extent of such water shortage, its causes and consequences, the likelihood of its natural amelioration or termination, and the need for the suspension or minimum flow standards with regard to particular impoundments or diversions, or within an entire region, or within the entire State. The Commissioner shall render his decision within three (3) working days of the receipt of a water supply emergency petition.

In determining whether a water supply emergency exists or is likely to exist in the immediate future, the Commissioner's considerations may include, but are not limited to, the following factors:

(1) Runoff or rainfall statistics for the watershed area for the period in question as compared with average runoff or rainfall over preceding years for comparable periods;

(2) Impoundment levels or volume of diversion as compared with levels or volumes at the same season in previous years;

(3) Peculiar or unusual demand situations or requirements to protect water quality;

(4) Peculiar or unusual water capture problems; and

(5) Unusual health, safety, power, or other crises imposing increased demands on water supplies.

(c) The Commissioner may modify the operation of minimum flow standards beyond the time at which incoming supplies, or losses, or use patterns of water return to normal, so that water supply deficits may be corrected.

(d) All declarations of water supply emergencies shall contain:

(1) The structures or stocked river or stream systems over which the operation of minimum flow standards shall be suspended;

(2) The duration of such modification, if for a definite term, or the conditions upon which the modification shall terminate if for an indefinite term; and

(3) Notice of the right of aggrieved persons to a hearing to appeal such modification, provided that such appeal, while pending, shall not enjoin the operation of such modification.

(e) All declarations of water supply emergencies shall be published in a newspaper of general circulation in the municipality or municipalities wherein the emergency exists, and a certified copy shall be sent to all operators of affected impoundments and diversions, the chief executive officers of municipalities wherein the affected structure or the impaired stocked river or stream system is located, the State Commissioner of Health, and the Public Utilities Control Authority.

(Effective April 24, 1979)

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Sec. 26-141a-5. Filing requirements

(a) Operators of existing impoundments or diversions subject to these regulations shall file the following information within twelve (12) months after the effective date of these regulations. Operators of new impoundments or diversions subject to these regulations shall file such information three (3) months before the start of operation of such facilities.

(1) Name of structure; name, address and telephone number of owner and operator; location of structure on U.S. Geological Survey topographic map; purpose and use of structure; location of discharge.

(2) Drainage area above structure; reservoir capacity at various elevations; stream flow records; the safe yield of the facility; demand requirements.

(3) Frequency of recurrence of water surface elevations on the first day of each calendar month. Such water surface elevations and the frequency of occurrence may be corrected to what they would have been under conditions of current demand and current diversion requirements.

(4) Type, capacity and control capability of all discharge devices.

When two or more structures are operated as a single facility and the safe yield is interdependent, the method of operation shall be described, including the anticipated method of compliance with the requirements of Section 26-141a-6.

(b) Such data for new structures or for existing structures when not available from records shall be computed by standard engineering methods which methods shall be clearly outlined in the submission and approved by the Commissioner.

(c) Operators shall, within sixty (60) days, report any changes in data provided in accordance with this section. (Effective April 24, 1979)

Sec. 26-141a 6. Flow requirements

(a) Subsequent to the approval by the Commissioner of the information filed under Section 26-141a-5, the operator of any impoundment or diversion subject to these regulations shall cause a release on each day of the current month a daily flow not less than that computed by multiplying the drainage area by the appropriate flow obtained from the following table:

Required Daily Average Releases in Cubic Feet per Second per Square Mile of Drainage Area

Percent of Safe Yield Utilized

Existing Impoundments

	0	75	85	95	100	
100-		.20	.15	.10	.05	.01	-100
50-		.15	.10	.05	.01	.01	- 50
20-		.10	.05	.01	.01	.01	- 20
10-		.05	.01	.01	.01	.01	- 10
5-		.01	.01	.01	.01	.01	- 5
0-							- 0

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New Impoundments

100-						-100
	.25	.20	.15	.10	.05	
50-						- 50
	.20	.15	.10	.05	.02	
10-						- 10
	.15	.10	.05	.02	.02	
5-						- 5
	.10	.05	.02	.02	.02	
0-						- 0

For impoundments—percent chance of occurrence of corrected calendar month water surface elevations being equal to, or lower than, the elevation on the first day of the current month.

For diversions—percent chance of occurrence of previous calendar month flow being equal to, or lower than, the actual flow during the previous month.

(b) Except that flow rates equal to, or exceeding, the mean inflow rate for March shall be allowed to pass during any consecutive five (5) days from February 15 to March 15. If the required Daily Average Release is below 0.20 cubic feet per second per square mile of drainage area, the number of days of such release of March mean inflow shall be reduced in accordance with the following table:

Required Daily Average Release	*Required Number of Days of Release of March Mean Inflow*
0.15	4
0.10	3
0.05	2
0.01	1

(c) The required daily releases shall be at a constant instantaneous rate throughout the day unless a variance is granted under Section 26-141a-4. (d) The releases required by this section shall be determined in the watercourse immediately below the impoundment or diversion, or in the case of existing impoundments or diversions, in the locations where releases normally occur.

(e) All impoundments or diversions placed in operation subsequent to the effective date of these regulations shall include discharge devices with adequate controls to provide the required releases.

(f) :Except for flows required by (b), no release shall be required which is in excess of the natural flow of water into the impoundment or diversion on that day.

(g) If the impoundment or diversion is downstream of an impoundment or diversion which is in noncompliance with these regulations, the required releases may be reduced to the extent of the upstream noncompliance.

(h) Releases shall not be made through discharge devices which the Commissioner has found will discharge water of unsatisfactory quality for the preservation, protection or safe maintenance of the natural or stocked wildlife.

(Effective April 24, 1979)

Sec. 26-141a-7. Hearing

(a) Any person may request a hearing consistent with the applicable sections of 22a-7-1 through 22a-8-11 of the regulations of the Department of Environmental Protection when they file petitions under Section 26-141a-4 (a) of these regulations. A person aggrieved by the denial of a petition or a request for a Water Supply Emergency Declaration under Section 26-141a-4 (b) of these regulations may request

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a hearing consistent with 22a-7-1 through 22a-8-11 of the regulations of the Department of Environmental Protection.

(Effective April 24, 1979)

Sec. 26-141a-8. Conflict and severance

(a) Where there is a conflict between the provisions of these regulations and those of any other applicable ordinance or regulation, the provisions of the ordinance or regulation which imposes the most stringent flow standards shall govern.

(b) The invalidity of any word, clause, sentence, section, part, or provision of these regulations shall not affect the validity of any other part which can be given effect without such invalid part or parts.

(Effective April 24, 1979)

Attachment C

This document contains the Connecticut regulations for Minimum Stream Flow Standards. This document was prepared by the State of Connecticut Department of Environmental Protection and is provided for the convenience of the reader. This is not the official version of the regulations. The official regulations are published by the State of Connecticut, Judicial Branch, Commission on Official Legal Publications in the Connecticut Law Journal. In the event there is inconsistency between this document and the regulations as published in the Connecticut Law Journal, the Connecticut Law Journal publication will serve as the official version.

D

Attachment D

BILL SUBJECT TO ENV. COMM. HEARING

General Assembly
January Session, 2005

Raised Bill No. 1294

LCO No. **4429**

04429_____ENV

Referred to Committee on Environment
Introduced by:
(ENV)

AN ACT CONCERNING THE MINIMUM WATER FLOW REGULATIONS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 26-141a of the general statutes is repealed and the following is substituted in lieu thereof (*Effective January 1, 2006*):

[Whenever any dam or other structure is maintained in this state which impounds, or diverts, the waters of a river or stream which is stocked with fish by the Commissioner of Environmental Protection, or which dam or other structure affects the flow of water in such a stocked river or stream, the commissioner may promulgate regulations setting forth standards concerning the flow of such water in accordance with section 26-141b.]

For purposes of this section and sections 26-141b, as amended by this act, and 26-141c, as amended by this act, (1) "diversion" means any activity that causes, allows or results in the withdrawal from or the alteration, modification or diminution of the instantaneous flow of the waters of the state, (2) "divert" means to engage in any act of diversion, (3) "waters" means all rivers, streams, brooks, waterways, lakes, ponds, marshes, swamps, bogs and all other bodies of water, natural or artificial, vernal or intermittent, public or private, that are contained within, flow through or border upon this state or any portion thereof.

Sec. 2. Section 26-141b of the general statutes is repealed and the following is substituted in lieu thereof (*Effective January 1, 2006*):

The Commissioner of Environmental Protection shall, [on or before July 1, 1973, and after consultation and cooperation with the Department of Public Health, the Department of Public Utility Control and any other agency, board or commission of the state with which said commissioner shall deem it advisable to consult and after recognizing and providing for the needs and requirements of public health, flood control, industry, public utilities and water

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supply, and further recognizing and providing for stream and river ecology, the requirements of aquatic life, natural wildlife and public recreation, and after considering the natural flow of water into an impoundment or diversion, and being reasonably consistent therewith, and also after thirty days' notice in the Connecticut Law Journal and after thirty days' notice sent by certified mail to all persons, firms and corporations known to have a direct interest, hold a public hearing and, not earlier than thirty days thereafter, shall promulgate regulations establishing instantaneous minimum flow standards and regulations for all stocked river and stream systems. Such instantaneous minimum flow standards and regulations shall: (1) Apply to all river and stream systems within this state which the commissioner finds are reasonably necessary to keep a sufficient flow of water to protect and safely maintain the fish placed therein by him pursuant to his stocking program; (2) preserve and protect the natural aquatic life, including anadromous fish, contained within such waters; (3) preserve and protect the natural and stocked wildlife dependent upon the flow of such water; (4) promote and protect the usage of such water for public recreation; (5) be consistent with the needs and requirements of public health, flood control, industry, public utilities, water supply, public safety, agriculture and other lawful uses of such waters] not later than January 1, 2006, adopt regulations in accordance with the provisions of chapter 54, for interim water flow regulations for a dam or other structure that impounds or diverts the waters of the state, which regulations provide for a sufficient flow of water to preserve and protect natural aquatic life and that are based on natural variation of flows and water levels, allowing variances if the subject use will still be protective of water quality within that classification. Not later than __, the commissioner shall adopt regulations, in accordance with the provisions of chapter 54, for water flow regulations for a dam or other structure that impounds or diverts the waters of the state, which regulations provide for maximum sustainable use of the waters of the state, provide a sufficient flow of water to preserve and protect natural aquatic life and biological, chemical and physical integrity of the waters of the state, are based on natural variation of flows and water levels and are watershed-specific.

Sec. 3. Section 26-141c of the general statutes is repealed and the following is substituted in lieu thereof (*Effective January 1, 2006*):

After the [promulgation of the aforesaid minimum flow standards] adoption of the regulations pursuant to section 26-141b, as amended by this act, no person, firm or corporation shall maintain any dam or structure impounding or diverting water within this state except in accordance with such [standards and] regulations as established by [said commissioner] the Commissioner of Environmental Protection. If the commissioner finds that any person, firm or corporation is violating such [minimum] water flow [standards] regulations, the commissioner shall issue an order to such person, firm or corporation to comply with [his] the regulations. The order shall include a time schedule for the accomplishment of the necessary steps leading to compliance. If such person, firm or corporation fails thereafter to comply with the [standards and] regulations concerning [minimum] the flow of water, the commissioner is empowered to request the Attorney General to bring an action in the Superior Court to enjoin such person, firm or corporation from restricting the flow of such water in accordance with such [standards and] regulations.

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This act shall take effect as follows and shall amend the following sections:		
Section 1	*January 1, 2006*	26-141a
Sec. 2	*January 1, 2006*	26-141b
Sec. 3	*January 1, 2006*	26-141c

Statement of Purpose:

To establish interim and long-term water flow regulations, which regulations will provide for a sufficient flow of water to preserve and protect natural aquatic life.

[Proposed deletions are enclosed in brackets. Proposed additions are indicated by underline, except that when the entire text of a bill or resolution or a section of a bill or resolution is new, it is not underlined.]

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Attachment E

General Assembly

Substitute Bill No. 1294

January Session, 2005

* SB01294ENV 040105 *

AN ACT CONCERNING THE MINIMUM WATER FLOW REGULATIONS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 26-141a of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2005*):

Whenever any dam or other structure is maintained in this state which impounds, or diverts, the waters of a river or stream [which is stocked with fish by the Commissioner of Environmental Protection,] or which dam or other structure affects the flow of water in such a [stocked] river or stream, the [commissioner] Commissioner of Environmental Protection may promulgate regulations [setting forth standards] concerning the flow of such water in accordance with section 26-141b, as amended by this act.

Sec. 2. Section 26-141b of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2005*):

The Commissioner of Environmental Protection shall, on or before [July 1, 1973] December 31, 2006, and after consultation and cooperation with the Department of Public Health, the Department of Public Utility Control and any other agency, board or commission of the state with which said commissioner shall deem it advisable to consult and after recognizing and providing for the needs and requirements of public health, flood control, industry, public utilities and water supply, and further recognizing and providing for stream and river ecology, the requirements of aquatic life, natural wildlife and public recreation, and after considering the natural flow of water into an impoundment or diversion, and being reasonably consistent therewith, [and also after thirty days' notice in the Connecticut Law Journal and after thirty days' notice sent by certified mail to all persons, firms and corporations known to have a direct interest, hold a public hearing and, not earlier than thirty days thereafter,] shall [promulgate] adopt regulations, in accordance with the provisions of chapter 54, establishing instantaneous minimum flow [standards and] regulations for all [stocked] river and stream systems. Such [instantaneous minimum flow standards and] flow regulations shall: (1) Apply to all river and stream systems within this state; [which the commissioner finds are reasonably necessary to keep a sufficient flow of water to protect and safely maintain the fish placed therein by him pursuant to his stocking program;] (2) preserve and protect the

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natural aquatic life, including anadromous fish, contained within such waters; (3) preserve and protect the natural and stocked wildlife dependent upon the flow of such water; (4) promote and protect the usage of such water for public recreation; (5) [be consistent with] provide for the needs and requirements of public health, flood control, industry, public utilities, water supply, public safety, agriculture and other lawful uses of such waters; and (6) be based on the best available science and on natural variation of flows and water levels. Such flow regulations may provide special conditions or exemptions for a hardship including, but not limited to, an economic hardship, an extreme circumstance, an agricultural diversion, a river or stream subject to a flow-management plan approved by the Commissioner of Environmental Protection, a water quality certification related to a license by the Federal Energy Regulatory Commissioner or a diversion that is necessary for a person to comply with the Public Health Code. Flow regulations adopted pursuant to this section, prior to the effective date of this section, shall remain in effect until the Commissioner of Environmental Protection adopts new regulations pursuant to this section.

Sec. 3. Section 26-141c of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2005*):

After the [promulgation of the aforesaid minimum flow standards] adoption of the regulations pursuant to section 26-141b, as amended by this act, no person, firm or corporation shall maintain any dam or structure impounding or diverting water within this state except in accordance with such [standards and] regulations as established by [said commissioner] the Commissioner of Environmental Protection. If the commissioner finds that any person, firm or corporation is violating such [minimum flow standards] water flow regulations, the commissioner shall issue an order to such person, firm or corporation to comply with [his] the regulations. The order shall include a time schedule for the accomplishment of the necessary steps leading to compliance. If such person, firm or corporation fails thereafter to comply with the [standards and] regulations concerning minimum flow of water, the commissioner [is empowered to] may request the Attorney General to bring an action in the Superior Court to enjoin such person, firm or corporation from restricting the flow of such water in accordance with such [standards and] regulations.

This act shall take effect as follows and shall amend the following sections:		
Section 1	*October 1, 2005*	26-141a
Sec. 2	*October 1, 2005*	26-141b
Sec. 3	*October 1, 2005*	26-141c

ENV *Joint Favorable Subst.*

F

Attachment F

General Assembly

January Session, 2005

File No. 354

Substitute Senate Bill No. 1294

Senate, April 14, 2005

The Committee on Environment reported through SEN. STILLMAN of the 20th Dist., Chairperson of the Committee on the part of the Senate, that the substitute bill ought to pass.

AN ACT CONCERNING THE MINIMUM WATER FLOW REGULATIONS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 26-141a of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2005*):

Whenever any dam or other structure is maintained in this state which impounds, or diverts, the waters of a river or stream [which is stocked with fish by the Commissioner of Environmental Protection,] or which dam or other structure affects the flow of water in such a [stocked] river or stream, the [commissioner] Commissioner of Environmental Protection may promulgate regulations [setting forth standards] concerning the flow of such water in accordance with section 26-141b, as amended by this act.

Sec. 2. Section 26-141b of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2005*):

The Commissioner of Environmental Protection shall, on or before [July 1, 1973] December 31, 2006, and after consultation and cooperation with the Department of Public Health, the Department of Public Utility Control and any other agency, board or commission of the state with which said commissioner shall deem it advisable to consult and after recognizing and providing for the needs and requirements of public health, flood control, industry, public utilities and water supply, and further recognizing and providing for stream and river ecology, the requirements of aquatic life, natural wildlife and public recreation, and after considering the natural flow of water into an impoundment or diversion, and being reasonably consistent therewith, [and also after thirty days' notice in the Connecticut Law Journal and after thirty days' notice sent by

certified mail to all persons, firms and corporations known to have a direct interest, hold a public hearing and, not earlier than thirty days thereafter,] shall [promulgate] adopt regulations, in accordance with the provisions of chapter 54, establishing instantaneous minimum flow [standards and] regulations for all [stocked] river and stream systems. Such [instantaneous minimum flow standards and] flow regulations shall: (1) Apply to all river and stream systems within this state; [which the commissioner finds are reasonably necessary to keep a sufficient flow of water to protect and safely maintain the fish placed therein by him pursuant to his stocking program;] (2) preserve and protect the natural aquatic life, including anadromous fish, contained within such waters; (3) preserve and protect the natural and stocked wildlife dependent upon the flow of such water; (4) promote and protect the usage of such water for public recreation; (5) [be consistent with] provide for the needs and requirements of public health, flood control, industry, public utilities, water supply, public safety, agriculture and other lawful uses of such waters; and (6) be based on the best available science and on natural variation of flows and water levels. Such flow regulations may provide special conditions or exemptions for a hardship including, but not limited to, an economic hardship, an extreme circumstance, an agricultural diversion, a river or stream subject to a flow-management plan approved by the Commissioner of Environmental Protection, a water quality certification related to a license by the Federal Energy Regulatory Commissioner or a diversion that is necessary for a person to comply with the Public Health Code. Flow regulations adopted pursuant to this section, prior to the effective date of this section, shall remain in effect until the Commissioner of Environmental Protection adopts new regulations pursuant to this section.

Sec. 3. Section 26-141c of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2005*):

After the [promulgation of the aforesaid minimum flow standards] adoption of the regulations pursuant to section 26-141b, as amended by this act, no person, firm or corporation shall maintain any dam or structure impounding or diverting water within this state except in accordance with such [standards and] regulations as established by [said commissioner] the Commissioner of Environmental Protection. If the commissioner finds that any person, firm or corporation is violating such [minimum flow standards] water flow regulations, the commissioner shall issue an order to such person, firm or corporation to comply with [his] the regulations. The order shall include a time schedule for the accomplishment of the necessary steps leading to compliance. If such person, firm or corporation fails thereafter to comply with the [standards and] regulations concerning minimum flow of water, the commissioner [is empowered to] may request the Attorney General to bring an action in the Superior Court to enjoin such person, firm or corporation from restricting the flow of such water in accordance with such [standards and] regulations.

This act shall take effect as follows and shall amend the following sections:		
Section 1	*October 1, 2005*	26-141a

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Sec. 2	*October 1, 2005*	26-141b
Sec. 3	*October 1, 2005*	26-141c

ENV *Joint Favorable Subst.*

The following fiscal impact statement and bill analysis are prepared for the benefit of members of the General Assembly, solely for the purpose of information, summarization, and explanation, and do not represent the intent of the General Assembly or either House thereof for any purpose:

OFA Fiscal Note

State Impact:

Agency Affected	Fund-Effect	FY 06 $	FY 07 $
Attorney General	GF - None	None	None
Department of Environmental Protection	GF/Environmental Quality - Cost	Minimal	None

Note: GF=General Fund

Municipal Impact: None

Explanation

The Department of Environmental Protection (DEP) has been working on water flow standards. It is anticipated that the DEP can adopt the required regulations in the timeframe specified in the bill, within existing resources through the diversion of one-half of an analyst away from current duties.

Any potential change in the number or scope of appeals as a result of the bill could be accommodated by the Office of the Attorney General within anticipated budgetary resources.

OLR Bill Analysis

sSB 1294

AN ACT CONCERNING THE MINIMUM WATER FLOW REGULATIONS

SUMMARY:

Under current law, the Department of Environmental Protection (DEP) commissioner has the authority to set minimum flow standards for rivers and streams (1) where a dam or other structure impounds or diverts the flow, and (2) that she stocks with fish. The bill

(1) authorizes her to adopt water flow regulations for all diverted or impounded rivers and streams, regardless of whether she stocks them, and (2) requires her to do so by December 31, 2006.

EFFECTIVE DATE: October 1, 2005

FLOW REGULATIONS

The bill requires that the commissioner base the minimum flow regulations on the best available science, and on natural variation of flows and water levels. As under current law, the regulations also must (1) apply to all state river and stream systems; (2) preserve and protect the natural aquatic life contained within such waters, including fish that travel from salt water to fresh water to spawn; (3) preserve and protect the natural and stocked wildlife dependent on the water flow; and (4) promote and protect water use for public recreation.

The bill replaces the current law's notice and hearing requirements for adopting regulations with those of the Uniform Administrative Procedure Act. It requires that flow regulations already in effect remain so until the commissioner adopts new regulations as the bill requires.

As under current law, the commissioner, in adopting the regulations, must consult with the public health department, department of public utility control, and any other agency, board, or commission with whom she finds it advisable to consult. Current law requires that the regulations, among other things, be consistent with the needs and requirements of public health, flood control, industry, public utilities, water supply, public safety, agriculture, and other lawful water uses. The bill specifies that the regulations provide for, rather than be consistent with, those needs and requirements.

The bill requires any person, firm, or corporation maintaining a dam or structure to comply with the regulations once adopted. It authorizes the commissioner to order anyone violating the regulations to comply with them according to a specific schedule. The commissioner may ask the attorney general to file a legal action to require any person, firm, or corporation to comply with the regulations.

SPECIAL CONDITIONS OR EXEMPTIONS

The bill authorizes the commissioner to provide in the regulations for special conditions or exemptions for hardships, including (1) economic hardships, (2) extreme circumstances, (3) agricultural diversions, (4) a river or stream subject to a flow management plan the commissioner approves, (5) a water quality certification related to a Federal Energy Regulatory Commission license, and (6) any diversion needed to comply with the Public Health Code. It does not define extreme circumstance.

BACKGROUND

Attachment F

Federal Energy Regulatory Commission

The commission considers environmental impacts when licensing hydropower projects.

COMMITTEE ACTION

Environment Committee

Joint Favorable Substitute

Yea 28 Nay 0

TOP

G

Attachment G

General Assembly

Substitute Bill No. 1294

January Session, 2005

* SB01294PH 042605 *

AN ACT CONCERNING THE MINIMUM WATER FLOW REGULATIONS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 26-141a of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2005*):

Whenever any dam or other structure is maintained in this state which impounds, or diverts, the waters of a river or stream [which is stocked with fish by the Commissioner of Environmental Protection,] or which dam or other structure affects the flow of water in such a [stocked] river or stream, the [commissioner] Commissioner of Environmental Protection may promulgate regulations [setting forth standards] concerning the flow of such water in accordance with section 26-141b, as amended by this act.

Sec. 2. Section 26-141b of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2005*):

The Commissioner of Environmental Protection shall, on or before [July 1, 1973] December 31, 2006, and after consultation and cooperation with the Department of Public Health, the Department of Public Utility Control and any other agency, board or commission of the state with which said commissioner shall deem it advisable to consult and after recognizing and providing for the needs and requirements of public health, flood control, industry, public utilities and water supply, and further recognizing and providing for stream and river ecology, the requirements of aquatic life, natural wildlife and public recreation, and after considering the natural flow of water into an impoundment or diversion, and being reasonably consistent therewith, [and also after thirty days' notice in the Connecticut Law Journal and after thirty days' notice sent by certified mail to all persons, firms and corporations known to have a direct interest, hold a public hearing and, not earlier than thirty days thereafter,] shall [promulgate] adopt regulations, in accordance with the provisions of chapter 54, establishing instantaneous minimum flow [standards and] regulations for all [stocked] river and stream systems. Such [instantaneous minimum flow standards and] flow regulations shall: (1) Apply to all river and stream systems within this state; [which the commissioner finds are reasonably necessary to keep a sufficient flow of water to protect and safely maintain the fish placed therein by him pursuant to his stocking program;] (2) preserve and protect the

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natural aquatic life, including anadromous fish, contained within such waters; (3) preserve and protect the natural and stocked wildlife dependent upon the flow of such water; (4) promote and protect the usage of such water for public recreation; (5) [be consistent with] provide for the needs and requirements of public health, flood control, industry, public utilities, water supply, public safety, agriculture and other lawful uses of such waters; and (6) be based on the best available science and on natural variation of flows and water levels. Such flow regulations may provide special conditions or exemptions for a hardship including, but not limited to, an economic hardship, an extreme circumstance, an agricultural diversion, a river or stream subject to a flow-management plan approved by the Commissioner of Environmental Protection, a water quality certification related to a license by the Federal Energy Regulatory Commissioner or a diversion that is necessary for a person to comply with the Public Health Code. Flow regulations adopted pursuant to this section, prior to the effective date of this section, shall remain in effect until the Commissioner of Environmental Protection adopts new regulations pursuant to this section.

Sec. 3. Section 26-141c of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2005*):

After the [promulgation of the aforesaid minimum flow standards] adoption of the regulations pursuant to section 26-141b, as amended by this act, no person, firm or corporation shall maintain any dam or structure impounding or diverting water within this state except in accordance with such [standards and] regulations as established by [said commissioner] the Commissioner of Environmental Protection. If the commissioner finds that any person, firm or corporation is violating such [minimum flow standards] water flow regulations, the commissioner shall issue an order to such person, firm or corporation to comply with [his] the regulations. The order shall include a time schedule for the accomplishment of the necessary steps leading to compliance. If such person, firm or corporation fails thereafter to comply with the [standards and] regulations concerning minimum flow of water, the commissioner [is empowered to] may request the Attorney General to bring an action in the Superior Court to enjoin such person, firm or corporation from restricting the flow of such water in accordance with such [standards and] regulations.

This act shall take effect as follows and shall amend the following sections:		
Section 1	*October 1, 2005*	26-141a
Sec. 2	*October 1, 2005*	26-141b
Sec. 3	*October 1, 2005*	26-141c

ENV *Joint Favorable Subst.*
PH *Joint Favorable*

H

Attachment H

General Assembly

Amendment

January Session, 2005

LCO No. **5900**

SB0129405900SDO

Offered by:

SEN. STILLMAN, 20th Dist.

To: Subst. Senate Bill No. **1294** File No. 354 Cal. No. 289

"AN ACT CONCERNING THE MINIMUM WATER FLOW REGULATIONS. "

Strike everything after the enacting clause and substitute the following in lieu thereof:

"Section 1. Section 26-141a of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2005*):

Whenever any dam or other structure is maintained in this state which impounds, or diverts, the waters of a river or stream [which is stocked with fish by the Commissioner of Environmental Protection,] or which dam or other structure affects the flow of water in such a [stocked] river or stream, the [commissioner] Commissioner of Environmental Protection may [promulgate] adopt regulations, in accordance with the provisions of chapter 54, setting forth standards concerning the flow of such water in accordance with section 26-141b, as amended by this act.

Sec. 2. Section 26-141b of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2005*):

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The Commissioner of Environmental Protection shall, on or before [July 1, 1973] December 31, 2006, and after consultation and cooperation with the Department of Public Health, the Department of Public Utility Control, an advisory group convened by the Commissioner of Environmental Protection, and any other agency, board or commission of the state with which said commissioner shall deem it advisable to consult and after recognizing and providing for the needs and requirements of public health, flood control, industry, public utilities, [and] water supply, public safety, agriculture and other lawful uses of such waters and further recognizing and providing for stream and river ecology, the requirements of natural aquatic life, natural wildlife and public recreation, and after considering the natural flow of water into an impoundment or diversion, and being reasonably consistent therewith, [and also after thirty days' notice in the Connecticut Law Journal and after thirty days' notice sent by certified mail to all persons, firms and corporations known to have a direct interest, hold a public hearing and, not earlier than thirty days thereafter,] shall [promulgate] adopt regulations, in accordance with the provisions of chapter 54, establishing [instantaneous minimum] flow [standards and] regulations for all [stocked] river and stream systems. Such [instantaneous minimum] flow [standards and] regulations shall: (1) Apply to all river and stream systems within this state; [which the commissioner finds are reasonably necessary to keep a sufficient flow of water to protect and safely maintain the fish placed therein by him pursuant to his stocking program;] (2) preserve and protect the natural aquatic life, including anadromous fish, contained within such waters; (3) preserve and protect the natural and stocked wildlife dependent upon the flow of such water; (4) promote and protect the usage of such water for public recreation; (5) be [consistent with] based, to the maximum extent practicable, on natural variation of flows and water levels while providing for the needs and requirements of public health, flood control, industry, public utilities, water supply, public safety, agriculture and other lawful uses of such waters; and (6) be based on the best available science, including, but not limited to, natural aquatic habitat, biota, subregional basin boundaries, areas of stratified drift, stream gages and flow data, locations of registered, permitted, and proposed diversions and withdrawal data reported pursuant to section 22a-368a, locations where any dams or other structures impound or divert the waters of a river or stream and any release made therefrom, and any other data for developing such regulations or individual management plans. Such flow regulations may provide special conditions or exemptions including, but not limited to, an extreme economic hardship or other circumstance, an agricultural diversion, a water quality certification related to a license issued by the Federal Energy Regulatory Commission or as necessary to allow a public water system, as defined in subsection (a) of section 25-33d, to comply with the obligations of such system as set forth in the regulations of Connecticut state agencies. Any flow management plan contained in a resolution, agreement or stipulated judgment to which the state, acting through the Commissioner of Environmental Protection, is a party, or the management plan developed pursuant to section 3 of public act 00-152, is exempt from any such flow regulations. Flow regulations that were adopted pursuant to this section and sections 26-141a and 26-141c, as amended by this act, prior to the effective date of this section, shall remain in effect until the Commissioner of Environmental Protection adopts new regulations pursuant to this section.

Sec. 3. Section 26-141c of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2005*):

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After the [promulgation of the aforesaid minimum flow standards,] adoption of regulations pursuant to section 21-146b, as amended by this act, no person [, firm or corporation] or municipality, as defined in section 22a-423, shall maintain any dam or structure impounding or diverting water within this state except in accordance with [such standards and] regulations as established by [said commissioner] the Commissioner of Environmental Protection. If the commissioner finds that any person [, firm or corporation] or municipality, as defined in section 22a-423, is violating such [minimum flow standards] regulations, the commissioner shall issue an order to such person [, firm or corporation] or municipality to comply with [his] the regulations. The order shall include a time schedule for the accomplishment of the necessary steps leading to compliance. If such person, or municipality [firm or corporation] fails thereafter to comply with the [standards and] regulations concerning [minimum] flow of water, the commissioner [is empowered to] may request the Attorney General to bring an action in the Superior Court to enjoin such person [, firm or corporation] or municipality from restricting the flow of such water in accordance with such [standards and] regulations. "

This act shall take effect as follows and shall amend the following sections:		
Section 1	*October 1, 2005*	26-141a
Sec. 2	*October 1, 2005*	26-141b
Sec. 3	*October 1, 2005*	26-141c