

May 22, 2006

TESTIMONY OF THOMAS PALMER BEFORE THE JOINT COMMITTEE ON
ENVIRONMENT, NATURAL RESOURCES, AND AGRICULTURE

RE: HOUSE BILL 4914, A PETITION OF BRUCE AYERS AND ROBERT COUGHLIN, *AN
ACT TO PROTECT CERTAIN WETLANDS IN THE BLUE HILLS RESERVATION*

Dear Chairmen Resor and Smizik:

On behalf of Friends of the Blue Hills, I respectfully ask that you release House Bill 4914 with the recommendation 'ought to pass.'

My name is Thomas Palmer. I live in Milton and am President of Friends of the Blue Hills, a non-profit charitable trust that has dedicated itself since 1972 to the protection and preservation of the Blue Hills Reservation, the largest component of the commonwealth's historic metropolitan park system. I am an environmental advocate and wetlands consultant.

The bill before you concerns a plan by the Metropolitan Water Resources Authority (MWRA) to fill over eight acres of the Blue Hills Reservoir on Chickatawbut Road in Quincy in order to construct two concrete drinking water storage tanks 43 feet high and 240 feet in diameter at a projected cost of \$33 million.

The bill seeks to address the damage that will be done to the Reservation by the tanks by requiring MWRA to replace the protected wetlands that will be lost, as is consistent with the state's long-standing no net loss of wetlands policy. Otherwise the project will produce the largest net loss of wetlands approved anywhere in the commonwealth since at least 1990, and will encourage wholesale filling of protected wetlands by public agencies without compensation, contrary to the legislative intent expressed by Chapter 131 section 40, commonly known as the Wetlands Protection Act.

SITE HISTORY

The Blue Hills Reservoir is the largest body of clean open water remaining in the city of Quincy. The land underneath it was among the first public purchases made for the Blue Hills Reservation in 1894, pursuant to a law authorizing the newly-created Metropolitan Park Commission to acquire scenic areas for public use and enjoyment. At that time the Reservoir did not exist, and its footprint was occupied by a high-elevation wooded wetland known as Twinbrook Swamp. The chief architect of the park system, Charles Eliot, laid out Chickatawbut Road to take advantage of the view across the wetland to the rocky ridgeline of the Blue Hills.

Five decades later, in 1951, the MDC created the reservoir by raising Chickatawbut Road, damming the wetland and allowing it to fill with water collected from the adjacent hillside. For thirty years the Reservoir furnished drinking water for the MDC system, until it was shut down in 1981. It has not been used since, and remained largely undisturbed until MWRA partially drained it last winter in preparation for the tank project.

The Reservoir is very much a part of the Reservation. It furnishes the longest water view from any road in the park. Official Blue Hills trail maps have recommended its robust bass and perch populations to fishermen since the 1980's. It supports over forty species of wetland plants, and provides habitat for a broad array of wildlife. It has been used as a public water supply for less than one-third of the park's 110-year history, and MWRA holds no title to it. When MWRA was created by the so-called Enabling Act in 1984, it inherited a right from MDC to use the Reservoir for water supply purposes, but acquired no land in or around it.

PERMITTING HISTORY

The MWRA tank project will eliminate over half of the 16-acre Reservoir by filling it with dirt and concrete. Following construction, its western end will be allowed to refill with water. Since MWRA does not propose to replace any of the open water and other wetlands that will be permanently eliminated, the project will generate a net loss of 8.7 acres of protected wetlands.

The Wetlands Act regulations at 310 CMR 10.00 prohibit filling of more than 5000 square feet of open water significant to the fisheries and habitat interests unless impacts to those interests are mitigated by replacement of the lost wetlands. By filling 8.7 acres of open water, MWRA will eliminate 72 times the permissible limit. Since no replacement is proposed, the project is, strictly speaking, unpermissible.

But the regulations also contain variance provisions allowing projects deemed to serve an overriding public purpose to go forward despite their failure to meet the requirements of the regulations. MWRA received a variance from DEP Commissioner Robert Golledge in November, 2003, and the variance was finalized in September, 2005. It was the first variance issued since 1990 or earlier that required no replacement of lost wetlands.

The Commissioner's variance decision rejects and discards any notion that public agencies seeking to fill protected wetlands must mitigate damage to public interests by replacing those wetlands elsewhere. It disavows, for the first time, the no net loss of wetlands policy introduced by Governor Weld and EOEA Secretary DeVillars fifteen years ago. It states that mitigation via replacement is a burden that DEP Commissioners may choose to impose or not as they see fit. It does not explain why every other public project approved since 1990 proceeded under that burden, or why it was removed for the tank project.

In 1999, for instance, MWRA sought and received a Wetlands Act variance to construct a drinking water storage tank beside the Mass Pike in Weston. That project required filling 2.1

acres of protected wetlands, and Wetlands Act variance issued by DEP obliged MWRA to replace those 2.1 acres—which it did, in addition to providing the town with \$3.5 million to purchase conservation land. But the variance awarded to MWRA for the Blue Hills tanks does not reveal why the Commissioner determined that MWRA had to replace one hundred percent of lost wetlands in Weston, but not even one percent in Quincy.

In early 2000, in our first written comment on the MWRA tank proposal, Friends of the Blue Hills stated that we could support it provided that impacts to Reservation wetlands were mitigated by creation or protection of wetlands at the same scale—the definition of no net loss. MWRA answered that it intended to “focus mitigation on the project site”—another way of saying that it had no intention of replacing the lost wetlands, since the immediate area could not accommodate such replacement.

Our position was echoed at every level of project review. In September, 2002 the Quincy Conservation Commission found that the wetlands should be replaced. In the summer of 2003 analysts for DEP and EPA declared—as we learned via public records requests—that the proposed mitigation was inadequate. In September, 2005, following an adjudicatory hearing, an administrative magistrate ruled that the project could go forward provided that 8.7 acres of wetlands were created elsewhere. By then many other parties had written to DEP calling for the wetlands to be replicated, including the Mayor of Quincy, the Milton Conservation Commission, sixteen statewide environmental organizations, and seven local legislators, including the House sponsors of this petition.

This chorus made clear that wetlands protection is not only a public purpose established by law, but a public good recognized by the public and the public’s representatives—the same public that MWRA and DEP were ostensibly created to serve. But these pleas had no effect on the public project. The Commissioner approved the tanks as originally proposed, including the net loss of 8.7 acres of protected wetlands in the Blue Hills Reservation.

IMPORTANCE OF WETLANDS

It is no exaggeration to say that the Wetlands Protection Act is the most powerful conservation law in Massachusetts. It strictly controls work in or near wetlands, and wetlands are widespread throughout the state. All 351 of the commonwealth’s cities and towns maintain volunteer Conservation Commissions which oversee the implementation of the Act. These Commissions are empowered to protect wetlands for the public goods they provide—namely, clean water, open space for recreation, wildlife habitat, flood control and many other irreplaceable benefits.

The public interests that wetlands support cannot be protected unless the wetlands themselves are protected. When wetlands are filled they can no longer support the interests. Over the last thirty years the Act has greatly slowed the stream of cumulative wetland losses dating from colonial times. The Act properly requires those seeking to fill wetlands to show that public interests supported by wetlands will not be damaged or, if damages will occur, such damages will be adequately mitigated. Since mitigation for wetland filling has traditionally been defined

as area-for-area wetlands replacement, this process has made it difficult and expensive to fill wetlands, and contributed greatly to their protection.

The Blue Hills variance awarded to MWRA breaks with this history by relieving public agencies proposing to fill wetlands from any obligation to provide mitigation comparable to impacts. Filling wetlands will no longer entail creating wetlands of similar dimensions. Instead, any mitigation whatsoever may be proposed, and the Commissioner may require as much or as little as he pleases. In the absence of any quantitative standards for the sufficiency of mitigation, the permit-review process will become volatile and unjust, and large public projects—which, by their nature, generate the greatest wetland impacts—will be less subject than any others to real-world mitigation requirements. Private landowners and developers will not fail to note that the state is exempting itself from standards it imposes on others, and will demand equal treatment. Planning will become difficult or impossible if mitigation costs cannot be accurately predicted. Most importantly, public agencies will deliberately site major projects in protected wetlands, which are often in public ownership, with the hope that they also will receive a variance like the one issued to MWRA in the Blue Hills, which transfers the substantial and permanent costs of wetland destruction from the responsible party to the environment and the public at large, including future generations.

WHAT THIS BILL WILL DO

The narrow application of House 4914 is deliberate. It does not affect any other project but the MWRA water tanks in the Blue Hills. It does not reach the question of whether the massive tanks are necessary, even though they were termed “costly and redundant” by John Carroll, the longest-serving member of the MWRA Board. It does not prevent the tanks from being built, but only requires that they meet mitigation standards that have been applied to every other large public project for a generation, including the Big Dig, the Rt. 3 expansion, the Greenbush line, and the MWRA’s similar tank project in Weston.

The bill requires that work on the project cease until such time as MWRA proposes to replace the 8.7 acres of protected wetlands that will be lost, and identifies a site and outlines a schedule by which such replacement will take place in the course of the project. If DEP finds that the conditions stated above have been met, it may reissue the variance and allow the project to proceed. The bill therefore places no undue burden on the project, but merely requires it to meet a standard that dozens of other projects have routinely met, and that this project would have met and could have met if the Commissioner had not arbitrarily determined to award MWRA an unprecedented exemption from the Wetlands Protection Act.

WHY THIS BILL SHOULD PASS

Last week attorneys from DLA Piper Rudnick representing Friends of the Blue Hills *pro bono* filed papers at Norfolk Superior Court in Dedham alleging that the Wetlands Act variance issued to MWRA by DEP Commissioner Golledge plainly violates the spirit and the letter of the Wetlands Protection Act.

Presumably the judge reviewing the case will look to the thirty-year-old Act itself for clues to the legislature's intent in protecting public interests in wetlands. This committee can shorten his search by providing fresh evidence of its support for wetlands protection. Such support has already been demonstrated by letters sent to DEP or MWRA by four of the five legislators whose districts include the Blue Hills, including Senator Joyce and Representatives Galvin, Timilty, and Ayers. All asked that the valuable wetlands to be lost to the project be replaced, and all were disregarded. Therefore it is entirely appropriate that this committee should furnish new evidence of the durable intent behind the Act by repairing a process that went awry in the Blue Hills.

House 4914, if passed, will leave no doubt that it is this body's view that laws mandating wetlands protection cannot be effective if parties subject to them can be exempted at will by officials responsible for implementing such laws. The variance granted for MWRA for the Blue Hills tanks is indeed such an exemption, since it not only permits MWRA to fill protected wetlands wholesale, but relieves it from replacing any of them, and allows the work to proceed as there were no such thing as a Wetlands Protection Act. We note that the MWRA's 1984 enabling legislation specifically makes it subject to the Act.

The bill will have the added merit of restoring the balance between resource protection and the need to provide secure supplies of drinking water. The variance states, in effect, that every other consideration must give way to MWRA's need to maintain and expand its water delivery system. In contrast, the bill supports the notion that, as important as provision of such water may be, it cannot be allowed to cancel and invalidate the long-standing public interest in protecting wetlands written into law.

Friends of the Blue Hills would not exist if this legislature's leaders had not foreseen, over a century ago, that our state would continue to grow, and that protection of large areas of parkland was essential to make that growth tolerable and productive. The Blue Hills Reservation is finest local product of that vision, and the MWRA tank project is the largest construction proposed within it in fifty years. Please show that you share our concern for the park and its resources, which belong to all of the people, and give House 4914 a favorable report.

Signed this 21st day of May, 2006

Thomas Palmer
President, Friends of the Blue Hills