

## **STATE WATER PLAN**

### **Concerns regarding Public Trust Language**

**Bridgeport Regional Business Council  
Chamber of Commerce of Southeastern CT  
Connecticut Association of Golf Course  
Superintendents  
Connecticut Association of Smaller  
Manufacturers  
Connecticut Business & Industry  
Association (CBIA)  
Connecticut Conference of Municipalities  
(CCM)  
Connecticut Construction Industries  
Association (CCIA)  
Connecticut Council of Small Towns  
(COST)  
Connecticut Environmental Council  
Connecticut Farm Bureau  
Connecticut Greenhouse Growers  
Association**

**Connecticut Industrial Energy Consumers  
Connecticut Lodging Association  
Connecticut Marine Trades Association  
Connecticut Nursery and Landscape  
Association  
Connecticut River Valley Chamber of  
Commerce  
Connecticut State Golf Association  
Home Builders & Remodelers Association  
of Connecticut  
Middlesex County Chamber of Commerce  
National Federation of Independent  
Business (NFIB)  
Naugatuck Chamber of Commerce  
United Technologies Corporation (UTC)  
Waterbury Regional Chamber of Commerce  
Watertown Chamber of Commerce**

After four years of collaborative discussions among the Water Planning Council (WPC) and stakeholders, the State Water Plan was revised at the 11<sup>th</sup> hour to insert language that raises concerns regarding the expansion of the Public Trust Doctrine in Connecticut. It does this by misapplying the public trust reference in the preamble to the Connecticut Environmental Policy Act (CEPA) to the balancing of water uses. This mirrors the language relied upon by the California Supreme Court in the landmark *Mono Lake* decision in expanding the Public Trust Doctrine and concluding that longstanding water rights could be reconsidered and, if necessary, curtailed to protect the public trust.

#### **Why is this a problem?**

Under an expanded Public Trust Doctrine, registered and permitted diversions and other established water rights, which public water suppliers, agriculture, business and other entities have invested in and relied upon to serve their customers, could be modified or revoked without compensation regardless of how this will impact the availability of water supplies needed to support public health, fire suppression, agriculture and economic development.

#### **What's at stake?**

The expansion or misapplication of the Public Trust Doctrine in Connecticut may jeopardize the availability of water supplies needed to:

- 1) Maintain business and industrial operations;
- 2) Support agricultural industries, including farms, nurseries and greenhouses;
- 3) Plan and move forward with state and local economic development projects, housing developments, shopping centers, and business expansion;
- 4) Address public health and safety needs, including fire suppression; and
- 5) Sustain operations at colleges, universities, hospitals, nursing homes and other health care facilities.

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The reference to public trust in the Plan is particularly troubling given that its proponents have relied on this concept to call for

- 1) the revocation of registered diversions, which public water suppliers have invested millions of dollars in maintaining and rely upon to meet public water supply needs;
- 2) the extension of stream flow regulations to groundwater supplies, which may result in water shortages and economic development moratoriums in certain municipalities; and
- 3) the imposition of inflexible water conservation requirements that may impose unnecessary and/or unachievable burdens on public water suppliers, agriculture, business operations, and residents.

#### **Expanding the Public Trust Doctrine conflicts with Connecticut Law**

According to a legal memorandum prepared by Day Pitney LLP, the Plan's references to public trust under the CEPA statute and the balancing of water uses are in direct conflict with: 1) the common law public trust doctrine; 2) the General Assembly's declaration of policy in Section 22a-15 of CEPA and related case law in Connecticut; 3) Connecticut's current water allocation system, including extensive laws and regulations; and 4) the Public Act directing the WPC to prepare a state water plan.

The Connecticut Supreme Court in *Waterbury v. Washington* considered the role of the CEPA statute in relation to other laws regulating water resources and concluded that the CEPA statute cannot be used to supersede other laws regulating water resources. By highlighting the CEPA statute as central to the State Water Plan's goal of balancing water uses, however, the Plan inappropriately uses the CEPA statute and its reference to the phrase "public trust" in a way that signals an expansion of the Public Trust Doctrine in Connecticut.

#### **The legislature did not direct the Water Planning Council to address the Public Trust Doctrine.**

Expanding the public trust doctrine is clearly outside the scope of the WPC's responsibilities under Public Act 14-163, which identifies 17 specific requirements that should be addressed in the State Water Plan. Nowhere in the statute or in the legislative history do the words "public trust" appear nor was the concept discussed during the numerous state water plan meetings held over a four-year period.

#### **The reference to public trust undermines the value of the State Water Plan as a guidance document.**

The State Water Plan was developed to provide clear guidance to policymakers regarding issues affecting the state's water resources. However, the reference to public trust has created enormous confusion, undermining the value of the Plan as a guidance document.

**Given the enormous implications of the public trust doctrine and the confusion that has been generated by tying the public trust language to the balancing of water uses, we urge lawmakers to delete these references from the State Water Plan.**

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Other issues raised during the public comment period have been identified in Section 6 of the State Water Plan as issues requiring further discussion, including the issue of public trust. This makes sense given the complexity of the case law, existing law, and common law involving the public trust and its application.