



Save Our Groundwater

P.O. Box 182
Barrington, NH 03825

March 12, 2007

Thomas S. Burack, Commissioner
State of New Hampshire
Department of Environmental Services
29 Hazen Drive
P.O. Box 95
Concord, New Hampshire 03302

Dear Commissioner Burack,

Thank you for inviting Save Our Groundwater to meet with you February 12, 2007 in Concord to discuss concerns about permitting issues relating to the USA Springs, Inc. process. We appreciate your outreach to our organization and look forward to continuing the dialogue.

We are writing to highlight the key points that we raised in our conversation with you. We would like to underscore what we said to you about having confidence in the technical abilities of the Department's staff, particularly those who work in the field to determine specifications for state permits.

However, we have a number of concerns about the validity and efficacy of the process that was and continues to apply to the myriad of state permits relating to the proposed USA Springs, Inc. bottled water operation and its affiliate companies Garrison Place Real Estate Investment Trust and the Just Cause Realty Trust. We also discussed with you concerns about access and equity issues with DES services and the role of DES in protecting New Hampshire's environment.

New Hampshire permits in the USA Springs, Inc. case involve four state agencies: the Department of Environmental Services (Large Groundwater Withdrawals, Wetlands Bureau, Waste Management Division), the Department of Health and Human Services and the Department of Transportation. Most of these agencies have also engaged the Department of Justice in the issuance of permits for this project. This letter focuses on our concerns with the DES process that we raised in our meeting.

We have long believed, based on documented fact and the pattern of events related to the permitting process for the USA Springs, Inc. project, that there has been, in essence, a trade of the state permits this company needs for a bottled water operation in exchange for the clean up of groundwater contamination at their site and the adjacent site of their affiliate, the Just Cause Realty Trust.

The record shows that contamination from the site adjacent to USA Springs, Inc. (now owned by the Just Cause Realty Trust, an affiliate of USA Springs, Inc. that paid \$250,000 to acquire an approximately 14-acre contaminated site. Source: Quitclaim Deed, Rockingham County Registry of Deeds, Book 4054, Page 2394 dated June 11, 2003) was drawn further into the aquifer as a result of the company's November

2002 pump test required for a large groundwater withdrawal permit under the state's Groundwater Protection Act, RSA 485-C. The company's refusal to clean up the site was documented by a DES engineer in a letter to the company dated September 29, 2003 and further discussed in the April 5, 2004 meeting of former Senator Dick Green's Ad Hoc Water Committee with Mr. Giunta, the current administrator of DES' Waste Management Bureau as documented in the minutes of this meeting.

We provided you with a copy of the minutes from this meeting. The minutes detail the political pressures brought to bear on DES in this case from the office of Craig Benson, the former governor. Tony Giunta is quoted as saying "Information has come in at the last minute. If they walk out...these contaminated sites linger for 10-20 years. People ask when are you (DES) going to clean it up? This company is going to clean up, at the cost of 1 mil to 1 1/2 mil dollars. It's a win win situation." When Senator Green asks what additional information the applicant had submitted since the original one, Giunta replies "Some, like w/analysis of draw down, etc., not substantial." When Green asked if it was DES' practice to accept substantially the same application a second time, Giunta replies "We are here to help the applicant through the process....."

The migration of contaminants further into the aquifer and adverse impacts as a result of the company's November 2002 pump test might not have taken place if DES had taken action based on the testimony of residents and its own staff concerning potential contamination at the Harnum Metals/Just Cause site. It might not have happened if DES had sought to halt the company's November 2002 pump test to avert potential groundwater contamination migration (please see enclosed March 26, 2003 letter from Assistant Attorney General Richard W. Head to USA Springs, Inc. attorney Gregory H. Smith, Esq. documenting the knowledge base about contamination at the Harnum property). It might not have happened if DES had listened to residents, including that of Nottingham resident Judy Doughty who provided both oral and written testimony to DES as part of the public comment periods about locally known hazardous waste at the Harnum Metals/Just Cause site adjacent to USA Springs, Inc.'s land. It might not have happened if DES had supported the Town of Nottingham's court effort to halt the pump test until more environmental data became available and until DES approved a pump test design. The DES Waste Management case resulting from the company's November 2002 pump test left Nottingham and Barrington residents with a aquifer and site clean-up estimated by state officials to cost more than \$1 million.

Sadly, the further migration of VOCs in the aquifer during the company's pump test became the leading adverse impact among the 27 scientific reasons that the Department of Environmental Services gave for denying USA Springs, Inc.'s/Garrison Place Real Estate Investment Trust's large groundwater withdrawal permit application in August 2003 and the subsequent appeal in December 2003. At the time, the DES stated that each of those scientific reasons had enough significance to deny the permit on its own merits.

The company "reapplied" to former DES Commissioner Michael Nolin at the end of December 2003 with a letter and on July 1, 2004, DES reversed its two previous denials in this case and issued a conditional large groundwater withdrawal permit for more than 300,000 gallons/day, laying the groundwork for all subsequent state and local permits the company needed. What had changed? The company, after initially refusing to clean-up the groundwater contamination from their pump test, had begun to remove the volatile organic compounds from the soil and aquifer. The company allegedly cleaned up the contamination and every state permit application since has been decided in their favor.

Our concern is that the large groundwater permitting process was tainted by executive interference that trumped the science in this case. Of equal importance is that the conditional water withdrawal permit developed by DES provides conditions only for water quantity, despite the fact that other potential

contamination sources are located within the 'zone of influence' established by DES as well as in the east-west trending fracture zone (we provided you with a list of these sources at the meeting). The DES Waste Management case was closed April 28, 2005 and the company issued a "Certificate of No Further Action."

The record also shows that the DES Wetlands Bureau reduced the scope of the prime wetlands hearing mandated by law, and following the company attorney's argument, would only consider the installation of monitoring devices into Barrington's prime wetlands as the subject of the hearing rather than the impact of the proposed bottled water operation. We brought to your attention the fact that the Wetlands Bureau had previously lost the original file for this case and that it had to be reconstructed. Further, Francesco Rotondo, the applicant and owner of USA Springs, Inc. was known to be a previous wetlands offender in New Hampshire. The Town of Barrington advised the state about the earlier violations in a letter.

Another irregularity we discussed was that the Wetlands Bureau ordered on December 17, 2004 that the public hearing for this project be held in Concord, December 28, in the evening, just three days after Christmas. Community residents were so angered by this latest ploy on the part of the state that more than eighty people showed up for the Concord hearing, including many of our state legislators. Many concerned residents were unable to attend due to the highly irregular scheduling and location of this meeting (all previous DES hearings regarding this project had been held in Nottingham or Barrington to encourage public participation). The Town of Barrington issued a press release about this DES action that we showed you at our meeting.

The DES has participated with the State Attorney General's office in seeking to deny standing in Save Our Groundwater's administrative appeals to DES concerning this case. This has taken place despite the fact that our organization has members who live in proximity to the proposed project (some even within the DES-imposed 1.5 radius 'zone of influence') and who have participated in the process because they stand to be affected by the outcomes. Save Our Groundwater members have written letters, signed and submitted petitions to DES, provided testimony at DES hearings and yet are systematically denied their due process by being denied the standing to participate in an administrative appeal hearing undertaken by their association. There has been no opportunity for the swearing-in of witnesses or their cross-examination. There has been no opportunity to present evidence in an adjudicative appeal hearing. Save Our Groundwater and the two municipalities have all requested adjudicative hearings from DES.

Communications between DES and those affected by this project—the municipalities and residents—were significantly restricted under the administration of Craig Benson, former governor and Michael Nolin, former DES commissioner. The practice of providing email updates on request was discontinued and access to DES staff was narrowed to requests through bureau heads only. Whereas in the past documents related to the case were faxed on request or added to the USA Springs, Inc. case website set up by DES, now they could only be obtained through a formal Right-to-Know file review and by traveling to the DES office building in Concord. Yet during this time USA Springs, Inc. continued to have regular access to DES staff and was provided assistance through the process.

We asked you what is the role of DES in balancing the needs of environment, municipalities and residents with those of the expediency of granting permits? How does the Department define services and to whom they provide such services in a permitting process? Does DES only help applicants for permits or does it also have a responsibility to provide services to the municipalities, residents and taxpayers of our state in an equitable manner? Is DES solely a permit-granting agency or does it seek to also carry out its

responsibilities in partnership with New Hampshire residents and municipalities to protect New Hampshire's environment for future generations?

Our experience taught us that at present, DES treats a large groundwater withdrawal permit that has the potential to impact multiple watersheds and communities as if it were a site-specific municipal zoning issue. We have also learned that DES believes it is there to help applicants through the state process but does not regard the municipalities and residents as their partner in determining the permits that affect them. We discussed the importance of a culture change at DES and expressed our hope that under your leadership the process of open communication and fair treatment of all parties engaging with DES will be restored.

The scientific data and knowledge base about the aquifer underlying the USA Springs, Inc. site did not change much between the company's permit application number one in 2001 and the letter that DES accepted as the so-called permit application number two in December 2003.

The company was not required to conduct another pump test under more reliable conditions than the one they did in November 2002 when the ground was frozen and it was snowing. DES' own consultant, ENSR International, in its report dated March 19, 2003, notes that the pump test was flawed because "...USA Springs did not provide pre-test water level and water quality data for monitoring wells to NHDES before the pumping test. This lack of submission and lack of final NHDES approval of the withdrawal test plan does not constitute a violation of Env-Ws 388 or 389, but represents a risk that the test procedures and related aspects of the investigation might not be adequate."

Even though contamination had been drawn further into the aquifer by just a 10-day pump test, no additional long-term environmental impact studies were required of the company. There was no additional monitoring of wells within the zone of influence by the state for water quality and as well quantity issues. Water quality monitoring is not a provision of the large groundwater conditional permit the company eventually obtained.

In reversing its earlier two denials of a large groundwater withdrawal permit to USA Springs, Inc. and ultimately granting the company a conditional permit, DES shifted from a precautionary approach that would not allow water withdrawn in the face of adverse impacts that had taken place to a resource-management one of mitigation and conditions that would hypothetically protect the people, plants and animals dependent on the water system if adverse impact were to take place again.

In the state's first significant test of the Groundwater Protection Act, DES chose to shift the burden of proof from the company seeking a permit to the New Hampshire residents and municipalities who might potentially be affected and would now have to show that a change in well water quality or quantity was caused by the company's pumping.

DES allowed the taking of a public resource—water—in granting a 10-year permit to USA Springs, Inc. for a large groundwater withdrawal of 112 million gallons a year. While we do not support the commodification of a public resource as important to life as water, if we were to look at this permit in the context of governmental best practices we would note that there was no competitive bidding process in the water give-away nor any provision for any financial return to the state's taxpayers. This company stands to make billions of dollars of profit from usurping a community's water supply, bottling it and selling it to other countries. The watersheds and communities potentially impacted by the project would see no share of this or received any benefit. In New Hampshire, when trees are cut a stump tax is

assessed; when land is sold a transfer tax is applied. Yet when the state gives permission for water to be taken out of the ground and transferred out of basin, it is all loss and no gain for the communities of life whom depend on it. And the state sees fit to give it away even when the municipalities involved do not want it taken.

While we may look back and lament the decisions that took place under prior administrations in this case, not taking action to restore justice for the environment and the communities impacted would be a failure of our state government. We must ask ourselves what happens to the people's trust and faith in government when questionable and possibly unethical behavior is tolerated because it may not rise to the level of criminal activity. The conduct of our state employees and officials should be held to the highest standards, beyond reproach and without any appearance of impropriety. When things go awry, they must be fixed and the scales of justice balanced.

We believe that companies like USA Springs, Inc. that create environmental messes, should not be rewarded by being given the state permits they need to set up shop because they finally agree to do what New Hampshire law requires them to do—in this case, clean up the aquifer contamination from their pump test. We believe that our state agencies should actively prosecute such offenders and uphold our state's laws without compromise.

We discussed with you our hope that DES might move to consider itself a partner with local communities in determining environmental issues and devote as much of their resources to supporting municipalities, neighborhood associations and the residents who take the time to participate in public hearings and meetings when topics arise between the state and towns concerning the intersection of environmental issues. We suggested that DES might consider establishing an ombudsman to assist municipalities and residents' associations in navigating the complex state environmental permitting process. We discussed and invited your possible attendance at a Save Our Groundwater meeting to meet with local residents concerned about this case.

We believe that neighborhood associations like Save Our Groundwater and the Neighborhood Guardians (an organization that focuses on the municipal land use permitting process in the USA Springs, Inc. case) play an important role in sharing local knowledge and professional expertise with DES and as such should be valued participants in the process. Sometimes a neighborhood organization or group of residents are more prepared to act quickly with 30-day limits than the more formal structure of a municipality where selectmen may only meet a few times a month and a conservation commission may meet only monthly. The process we describe may take more time, but we will all learn how to share our knowledge and work together—an essential element of any sustainable solution to an environmental issue.

Our dedication to this case is grounded in the belief that there should be one standard of justice and one standard of conduct applied fairly to all in our state. We do not believe that was the situation in this case.

We indicated our willingness to work with you and to continue the conversation that you initiated to find solutions for this case, the protection and management of New Hampshire's water, and the effective functioning of DES. We look to you as DES' commissioner to take the necessary steps to bring about a return to environmental justice in the USA Springs, Inc. case and to restore the communities' faith in the Department of Environmental Services. We request that you authorize an investigation into the DES permitting process for the USA Springs, Inc./Garrison Place Real Estate Investment Trust/Just Cause Realty Trust permits.

We thank you very much for inviting us to meet with you and for the time that you spent with us. We invite you to join us at one of our next Save Our Groundwater meetings between April and June to meet with our members. Our meetings usually take place the 2nd Thursday of the month but we would be happy to accommodate your schedule if another day is better.

We look forward to working together with you to protect and wisely manage our state's water resources.

Water is life,

Denise Hart, Clerk

For the Save Our Groundwater Board of Directors and on behalf of our members

Enc: March 26, 2003 letter from Richard W. Head, Assistant Attorney General to Gregory H. Smith, Esq., attorney for USA Springs, Inc.

cc: Governor John Lynch

Alice Chamberlin, Environmental Policy Advisor

Executive Councilor Beverly A. Hollingworth, District 3

Senator Jack Barnes

Senator Jacalyn Cilley

Senator Iris Estabrook

Senator Martha Fuller Clark

Senator Maggie Hassan

Representative Judith Spang

Representative Janet Wall

Representative Marlene DeChane

Carol Reilly, Barrington Town Administrator

Charles Brown, Nottingham Town Administrator

Mike Russo, Neighborhood Guardians Chair

A Partial Listing of Concerns Regarding the State Permitting Process for the USA Springs, Inc. and Affiliated Companies Large Groundwater Withdrawal and Bottled Water Proposal

An environmental case more than five years in the making is by necessity complex and involving multiple state agencies. An incomplete timeline of events in this case runs more than thirty-five pages. In the sections below, we cite examples of what we believe to be questionable DES practices in this case from the record that has amassed over the years. This should not be construed as a complete listing.

Department of Environmental Services Waste Management Division

—2002: Contaminants discovered to have mobilized in the aquifer during USA Springs, s Inc.'s pump test were known to the applicant December 3, 2002 and were not revealed to DES until the last possible date allowable by the rules sixty days later, at which point DES had to notify area residents about the contamination. Meanwhile, company attorney Gregg Smith had announced at a January meeting of the Nottingham Planning Board that the pump test revealed zero adverse impact.

The company waited until November 16, 2002 to collect samples from the site and rather than pay for one-day turnaround time, the samples were not analyzed until November 22, 2002, during the pump test, with results back from the lab after the pump test took place.

—September 9, 2003: At a meeting with DES Waste Management officials, USA Springs, Inc. refuses to perform additional work to clean-up the hazardous waste contamination that occurred at their site and that of their affiliate the Just Cause Realty Trust as a result of their November 2002 pump test unless they receive a large groundwater withdrawal permit. This is documented in a letter dated September 29, 2003 from DES Chief Engineer Frederick J. McGarry to USA Springs, Inc. attorney Gregory Smith.

—July 1, 2004: DES reverses its two previous decisions to deny the large groundwater withdrawal permit to USA Springs, Inc. and grants a conditional permit. The reversal takes place after a new governor, Craig Benson, is elected and he appoints in succession two new DES commissioners with the permit reversal happening under former DES Commissioner Mike Nolin's watch.

We believe that what took place was a trade of a large groundwater withdrawal permit for the clean-up of a hazardous waste site mobilized by the company's November 2002 pump test. We believe that a deal or agreement was made between DES and the company based on DES documentation in the public record and statements made by Tony Giunta, DES Administrator for the Waste Management Division and former administrator of Large Groundwater Withdrawals, at former Senator Dick Green's Water Advisory Committee in April 2004 (see minutes presented at our meeting).

Department of Environmental Services Large Groundwater Withdrawals Bureau

—July 1, 2004: When DES granted USA Springs, Inc. a conditional large groundwater withdrawal permit allowing up to 112 million gallons/year to be withdrawn from the local aquifer, DES went from a Precautionary Principle model of ensuring no adverse impact to groundwater to a risk assessment and mitigation model that says by placing enough conditions on a permit we can anticipate adverse impacts and provide for their mitigation.

This decision effectively shifted the burden of proof from the company needing to prove its operations would do no harm to the area residents and businesses who would now have to prove that the company's water pumping was the cause of any adverse impacts to well water quality and quantity (see SOG's Supreme Court Motion for Rehearing).

The DES conditional permit only looks at water quantity; it does not provide for monitoring of well water quality and groundwater assessment for wells within the state-imposed 'zone of influence' of 7000 feet or almost a one and one-half mile radius from the company's site or other potential water quality and/or quantity impacts that might take place outside this zone.

We believe that the reversal of the permit and the policy shift it represents is not the in the spirit or letter of the state's Groundwater Protection Act nor in the best interests of our communities and the environment that sustains us, our wildlife and plant life.

—1999: When the Harnum salvage yard property adjacent to the USA Springs, Inc. site (now owned by Just Cause Realty Trust) was transferred to K & B Realty Trust, the state came in and had to remove contamination at the site at that time. Reports of that clean up effort are not in the records for the USA Springs, Inc. case and should have been evaluated before allowing the company to conduct its 10-day pump test in November 2002. Many residents testified in person at DES and town public hearings and in

writing during 2001 and 2002 as to their knowledge and belief that contaminants still existed at this site.

When USA Springs, Inc. conducted its pump test volatile organic compounds were drawn further into the aquifer and created a hazardous waste site that required remediation and notification of adjacent well users. Why did DES not require advance sampling, given the history of the Harnum site?

Department of Environmental Services Wetlands Bureau – Wetlands Violations, Prime Wetlands

-- The owner of USA Springs, Inc., Francesco Rotondo, is a repeat wetlands offender in our state, having had two previous wetlands violations in 1993 in Barrington (DES Wetlands Bureau case number 1993-1218 and 1993-1863). As such, his proposal for a water bottling operation was required a higher level of scrutiny by the Department. Despite the fact that this information was brought to DES in public hearings and written comments, it was to no avail. Mr. Rotondo's site preparations incurred wetlands violations at the USA Springs, Inc. site, requiring additional DES staff time and a remediation process that has, as far as we're aware, never been satisfactorily completed.

— May 26, 2005: SOG Board Member Olivia Zink files a request to review the DES Wetlands Bureau file concerning permit #2001-716 issued May 25, 2005. DES does not respond to her request until May 31 and at then offers a file review date of June 3. Due to work schedule conflicts, Zink arranges to take off from work to review the file June 7. She travels to Concord at the appointed time, only to be told upon arrival that the file she wants to review was not available and that she will have to wait another five business days—the last day for filing an appeal of the wetlands permit issued. Zink sends an email documenting what happened at the Wetlands Bureau to Collis Adams, Gino Infascelli and Janet Hillson of DES and copies several state legislators. SOG files a motion for reconsideration of the permit June 14 documenting this and issues a news release June 15, 2005 about what took place.

We present this instance as a case study of the type of state agency resistance and interference with our Right to Know and right to redress grievances that board and members of Save Our Groundwater routinely experienced concerning this case.

—December 27, 2004: DES Wetlands hearing in Concord convened by Collis Adams: members of the community, Save Our Groundwater and the municipalities involved always questioned the peculiar timing of this public hearing noticed only a few days before the December holidays and held in Concord, almost 40 miles away from the communities involved as was not the DES practice in this case. DES established a very narrow scope for the hearing, following the USA Springs, Inc. attorneys' line of reasoning that the wetlands hearing should only involve devices put into the wetlands rather than the effects of consistent pumping of water out of the aquifer on the wetlands.

We believe that DES Wetlands did not follow the intent and spirit of the state's wetlands laws in this case, particularly as it applies to prime wetlands and sought to reduce public participation by locating the hearing in Concord and scheduling it two days after a major holiday.

—February 2003: Projections in the report from USA Springs, Inc.'s November 2002 pump test showed that water levels in Barrington's Prime Wetland #40 would likely drop more than two feet in a six-month period of no recharge. Because the DES Wetlands Bureau limited their scope to just the impact of devices inserted into the wetlands, per the arguments of USA Springs, Inc. counsel and at the time NH State Representative Tony F. Soltani, documented scientific projections about potential damage to the prime wetlands were not considered. We believe this to be illegal.

—2002: DES “lost” the original wetlands file in this case and it was never found. DES Wetlands Bureau official Gino Infascelli recreated the file from existing documents by making requests to the parties involved. It is unknown what original documents are missing.

We believe that the losing the wetlands file for this case tainted the permitting process and that key documents may not have been restored to the file.

—2001: Prior to their application for a Large Groundwater Withdrawal Permit, USA Springs, Inc. dredged and filled wetlands without a permit and were later cited by the state’s Wetlands Bureau in a Letter of Deficiency. The company’s mitigations initially failed; we are unsure of their status at this time.

Department of Environmental Services & Department of Health and Human Services – New Sources of Bottled Water Permit

—November 23, 2005: Save Our Groundwater (Docket No. 05-21 WC) and the Town of Nottingham Selectmen (Docket No. 05-22 WC) file appeals with the Water Council of the New Sources of Bottled Water Permit issued to USA Springs, Inc. The Water Council tables both appeals at its monthly meeting December 14, 2005 “pending legal advice from their counsel relative to questions of jurisdiction and standing.” Almost one year later, the Council, at its regular monthly meeting on December 12, 2006, goes into executive session for legal counsel and following the return to public session when the agenda moves to status of appeals, votes unanimously to again table discussions of these two appeals pending legal counsel. We have recently learned through a Right to Know request for the Water Council’s January 2007 meeting minutes that the council members voted to deny Save Our Groundwater’s appeal based on standing issues. No written opinion or decision letter to has yet been released by the council.

We believe this to be an unethical use of administrative review power and that the appellants have not received due process accorded by the United States Constitution.

—USA Springs, Inc. submitted its application for the “New Sources of Bottled Water” permit June 28, 2005. It wasn’t until August 10, 2005 that the DES Water Supply Engineering Bureau sent an email update notifying interested parties that public comment would be taken until August 26. Many people protested this as an unfair comment period as Boards of Selectmen do not meet each week during the summer and Conservation Commissions and Planning Boards usually meet once or twice monthly plus many residents are away on summer holidays. Finally, in the last hours of the comment period, DES extended it until September 9, 2005.

We believe that since DES conditionally approved the company’s Large Groundwater Withdrawal Permit, thus reversing its 2003 denials of the same to this company, that DES and other state agencies have acted in ways to limit public comment and reduce the scope of what might be discussed in the public hearings concerning this case.