WAYLAND WASTEWATER PRO-RATA DECISION
6/30/2014

The WWMDC has been asked to consider alternative ways of calculating the percentage allocation with respect to the division of costs associated with the new plant (Betterments). The Commission has dedicated several meetings over the last several months in an attempt to explore alternative concepts of allocation, and to educate users as to the legal constraints within which the Commission must operate. It has been suggested the Commission consider a method that adopts an allocation based on the 1999 MOA utilizing 45,000 gpd as the numerator and 52,000 gpd as the denominator which would result in a percentage allocation of 86% for Twenty Wayland LLC. This suggested approach is based upon the premise that the 52,000 gpd is a capacity that is a measurement of actual daily flow measured on a monthly basis with an annual limit issued by EPA under the Federal Clean Waters Act notwithstanding the fact that the 45,000 gpd is undefined in the 1999 MOA. However, the 1999 MOA expressly mandates the method of calculation which requires that same be predicated on a "pro-rata" share.

It is the opinion of the Commission that a pro-rata share must utilize a measurement that is identifiable, quantifiable and measurable, and that both the numerator and denominator must share a common definition. Utilizing any other definition would violate any common understanding of pro-ration. The Commission finds that the 45,000 gpd and the 52,000 gpd do not share a common meaning as required under this definition. The Commission looks to the 2006 Development Agreement for guidance with respect to the definition of the 45,000 gpd whereby it is expressly based upon 310 CMR 15:00 (Title 5) which is further defined under the regulations as "Design Flow". Accordingly, if the 45,000 gpd is utilized as the numerator (as expressed in the 1999 MOA), the denominator must also be defined as Design Flow. It is the opinion of the Commission, that the 45,000 gpd and 52,000 gpd fails the test of having a common definition, and therefore, such an approach should not be used in determining a pro-rata share.

The 52,000 gpd is a measurement of actual flow, however no corresponding measurement exists that can be utilized as a numerator that shares a common definition. As that capacity is a measurement of actual flow, a more appropriate method would utilize the aggregate actual flow from all the users on the system divided by the actual flow of each individual user; however the Commission finds that calculation to be inappropriate for calculating an allocation of a capital improvement as that improvement was based on capacity as dictated by MA DEP. Therefore, the Commission looks to capacity as a more appropriate method. The only definable capacity that can be identified for each user is Design Flow as defined in 301 CMR 15:00. There is no other capacity that can be identified for each user that the Commission is aware of. While the Commission will acknowledge the 52,000 gpd is a capacity, it is a capacity measured in actual flow. There is no corresponding flow that can be defined the same way for each individual user making it impractical in determining a pro-rata share.

It is the opinion of the Commission,that the suggested method calling for that the utilization of 45,000 gpd as the nominator and 52,000 gpd as the denominator does not comport with a pro-rata calculation as required by the 1999 MOA. Therefore, employing such a method would constitute a breach of the 1999 MOA thereby exposing the Commission and, by extension, the Users and the Town, to a lawsuit and damages that would arise from said breach and any associated legal fees expended to defend such an action, which amounts have the potential of being enormous and financially devastating to the Commission. It is the opinion of counsel, special counsel and the Commission, that the likelihood of prevailing in such an action is remote. Given the legal and financial exposure and unlikely chance of prevailing in court, it is the opinion of the Commission, that any allocation that is not based on a pro-rata share would be irresponsible and expose the Town, the Commission and the users to substantial and ultimately avoidable damages and legal fees that would arise out of a breach of the 1999 MOA. .

The additional suggestion that because the parties to the 1999 MOA knew, at the time, that the allocation was to be 86% and that percentage should become a static measurement that supersedes all other users or subsequent agreements post 1999, and therefore, every subsequent user should only be responsible for the balance (14%), is a position that the Commission believes cannot be supported under applicable law. The Commission is unaware of any case law that would support such a position or any evidence that would suggest the parties agreed on such a static allocation irrespective of any subsequent connections to the system. The fact that the 1999 MOA utilizes the methodology of a pro-rata share without specifying a percentage would support the opposite conclusion. In fact, the Users' (and Commission's) rationale for considering "surcharges" instead of "betterments" in part, was born from this very understanding – i.e., the more capacity on the system in the future the lower the users pro-rata share becomes. The Users have expressed a desire to not be locked into one static calculation which only the surcharge allows. To suggest the that Users benefit from this in the future while also suggesting one User should be locked into a number that reflected a suggested reality from 1999 is not a consistent argument.

It is clear that the Users are focused on achieving a result (86/14 or 70/30) and far less concerned with the underlying methodology and it's conformity to prior agreements and the law. Unfortunately, the Commission does not have the ability to ignore prior agreements and/or abandon any supportable method of calculating a pro-rata share in order to achieve a desired result. As Commissioners, we are required to properly apply the law and prior agreements on a consistent basis and not knowingly expose the Commission to prospective damages and legal fees when the chance of prevailing is extremely low. If the Commission capitulates under the political pressure to adopt a method that leads to excessive damages suffered by Twenty Wayland, LLC, it will put the Users in a far more difficult financial condition than it finds itself in today, as the Commission will be solely responsible for those damages (In other words, the Users will pay for any legal fees and any subsequent Judgment). The Commission believes that

the suggested methodology, while expedient, is financially and legally irresponsible and if adopted would constitute a dereliction of our implied duty and responsibility to act as a fiduciary to the users and the Town. For that reason, the Commission hereby adopts a methodology that utilizes the Design Flow (as defined in Title VI) for each individual User divided by the aggregate Design Flow (as defined in Title 5) of all users connected, or committed to be connected, to the system excluding the Town when establishing a percentage share for the purpose of calculating Betterments. It has been established the Town cannot lawfully be charged a "Betterment", and therefore, the Town has been removed from the pro-rata denominator.

The Commission understands the result is an enormous financial burden on some users and will do everything they can to facilitate a discussion with the Board of Selectman in order to explore ways in which that burden can be mitigated. The Commission agrees with the User's underlying issue based on equity and fairness and commits itself to working with the users in any lawful and responsible way to mitigate the financial impact the situation has imposed on them.