



November 29, 2011

Commissioner Kenneth Kimmell
MA Department of Environmental Protection
One Winter Street
Boston, MA 02108

Via Email: MassDEP.Commissioner@state.ma.us

Subject: Commissioner's Draft Action Plan for Regulatory Reform at MassDEP

Dear Commissioner Kimmell:

The Massachusetts Association of Conservation Commissions (MACC) appreciates the opportunity to participate in the Massachusetts Department of Environmental Protection's (MassDEP's) Regulatory Reform Initiative and to comment on the Commissioner's Draft Action Plan for Regulatory Reform (Draft Plan).

MACC understands that due to major budget cuts, MassDEP has experienced a significant reduction in capacity and must make decisions on how to most effectively deploy its current resources. In this context MACC supports MassDEP's efforts to seek regulatory and procedural efficiencies and prioritize its activities and initiatives. Further, we concur with the guiding principles listed in the Draft Plan particularly that proposed reforms should not *weaken or undermine environmental protection standards, reduce public process nor transfer responsibilities to municipalities.*

Although MACC retains an interest in a majority of the reform proposals offered by MassDEP, at this time our commentary is focused on issues that most likely impact our constituency to the greatest degree. MACC's comments are designed to advise MassDEP on the general considerations that we believe should be addressed in future analysis; our positions may change, as new details are unveiled.

Below MACC explains the preliminary reasoning behind our support for some proposals (2, 3, 5, 7, and 8), partial support for others (1, 4, 10), alternative suggestions on one (6), and possible qualified support over another (9). MACC also offers additional suggestions for regulatory reform.

Comments on Proposals Included in Section A: Wetlands, Waterways and Coastal Resources

1. Coastal/Dredging Programs: Permit Consolidation: Partial Support

MACC recognizes that the current permitting process for Coastal/Dredging projects contains some redundancies and there is potential for improved efficiency. Despite these redundancies, regulation at both the municipal and state level ensures that should regulatory standards be compromised at one level (for whatever reason) appropriate standards can be upheld at the other level. We recommend that MassDEP focus on integrating the two permitting programs administered by MassDEP.

A single permit application is acceptable, so long as the strongest elements of the standards from each program (Chapter 91 and 401 Water Quality Certification) remain in effect under the new procedure. MassDEP proposes a 401 permit-by-rule if the applicant receives an Order of Conditions or Superseding Order of Conditions under the Wetlands Protection Act (WPA) and a Ch. 91 permit if required. It is unclear how MassDEP would ensure that those other permits would fully address the Water Quality Standards. This requires careful analysis as the details of this proposal are developed. An option would be to retain all three permits where applicable, but to combine the application and review process for 401 and Ch. 91 to streamline review.

2. Chapter 91 Licensing: Revised Restrictions on Timeframes: Support

We support the revision of timeframes for issuance of Ch. 91 licenses relative to the Massachusetts Environmental Policy Act (MEPA) process provided that the revision does not result in reduced opportunities for Conservation Commissions to provide comments during either the Ch. 91 licensing or MEPA review processes.

3. Chapter 91 Licensing: Establish a Policy for License Terms: Support

MACC supports the development of a written policy for establishing license terms under Ch. 91 for non-water dependent uses, assuming that this will be a public process with an opportunity for MACC and others to review drafts of the policy and provide comments. We support this general approach as it has the potential to provide both more efficient review and consistent decision-making. Final MACC support for the policy itself will depend on the details.

4. Chapter 91 Licensing: General License for Small Docks and Piers: Partial Support

MACC recognizes that MassDEP is now obligated to create a general license for non-commercial small-scale docks, piers and similar structures. How well this general license contributes to environmental protection will depend on a) how “small-scale” is defined, and b) what conditions are required to qualify for the general license. MACC recommends that MassDEP include conditions that will protect sensitive wetland and aquatic areas and ensure the number of docks, piers and similar structures does not exceed the carrying capacity for water bodies.

5. Wetlands: Targeted Review by MassDEP: Support

MACC recognizes that with fewer staff available to review Notices of Intent (NOI), MassDEP will have to be strategic about when it chooses to spend time on NOIs submitted to Conservation Commissions. We suspect that a certain amount of triage is already occurring, and we support MassDEP's efforts to focus its involvement or intervention on projects with significant impacts to wetland resources.

MACC supports the Draft Plan proposal to issue MassDEP file numbers without delay, however regional staff should retain the authority to scan applications and flag or comment on any that are grossly deficient or that raise particular concerns due to the nature or extent of impacts. A statement should accompany the automatic issuance of file numbers that the NOI has not been reviewed for completeness or its compliance with applicable performance standards. This new procedure must not interfere with the ability of a Conservation Commission or MassDEP to subsequently identify missing or inaccurate information in the application and require submission of supplemental information. MassDEP should also retain the ability to undertake a preliminary review of some projects and to offer assistance to Conservation Commissions for identification of priority issues that warrant particular scrutiny.

Our impression is that the Western Regional Office, via the Circuit Rider, provides comments on virtually all NOIs via the file number letters. Commissions in the western part of the state largely do not have professional staff, and appreciate these comments. It does not appear that this level of effort is occurring in other regions. We are encouraged that MassDEP's proposal includes the following: "Note that MassDEP will continue to provide technical and regulatory assistance to the local conservation commission and others via the Wetlands Circuit Rider program and other activities." We request that the Western Regional Office continue to provide comments on, at a minimum, selected NOIs soon after the file number is issued and that other regions follow.

We are concerned that reductions in MassDEP oversight will result in too heavy reliance on citizen appeals and will eliminate support functions for Commissions, especially when they are subject to local pressure from town leaders or private groups that band together for particular improvements (e.g. rip-rapping river banks, sea walls, lake draw downs, dredging projects, etc.). It is important that MassDEP continue to provide some independent review of NOIs and Commission decisions, albeit using a strategic approach.

We would like to see MassDEP Regional Offices focus on projects with the highest potential for adverse impacts to resource areas, especially in towns that lack capacity to conduct technical reviews (e.g. staff, technical expertise, funding). We recommend that MassDEP develop and adopt guidelines for determining what projects will be reviewed and tracked by MassDEP staff. Issues to be considered should include the extent of proposed impacts to resource areas, the technical complexity of the situation and the capacity of the Conservation Commission to invest the necessary level of resources and/or expertise in its analysis and oversight of a project. MassDEP should also provide independent oversight review for municipally sponsored projects

and should consistently ensure that projects undertaken by state agencies such as the Department of Transportation and Department of Conservation and Recreation *comply fully* with the WPA and other state environmental laws.

6. Wetlands: Buffer Zone General Permit: Alternative Approach Proposed

Under MassDEP's previous effort, Simplified Review was no easier to use than a Request for a Determination of Applicability. For Conservation Commissions and conservation organizations Simplified Review represented a loss of jurisdiction with potential for adverse impact to resource areas.

We recommend that MassDEP take a fresh look at this topic, keeping in mind the strong scientific basis for buffer zones. Development of standards for buffer zone work would better meet MassDEP's goal of reducing time spent on buffer zone projects without reducing environmental protection. Conversely, a general permit allowing extensive work in the buffer zone without review by MassDEP or Conservation Commissions would reduce wetlands protection and is not consistent with the principles MassDEP has set forth for these reforms.

Scientific research continues to yield strong evidence that many activities, including most forms of development within buffer zones, results in the degradation of wetlands. Standards restricting work in the buffer zone are needed to maintain the biological and ecological integrity of wetlands and water bodies. That said it is true that many of the projects reviewed by Conservation Commissions and MassDEP, particularly those for additional minor work on previously developed properties, are unlikely to result in significant adverse impacts to resource areas. Modest amendments to the minor project provisions, if properly conditioned, along with improved clarity for review of all projects in buffer zones, could create regulatory efficiencies with a moderate risk of environmental impact.

As described in the MassDEP proposal the buffer zone general permit would almost certainly result in adverse impacts to resource areas because a general permit would eliminate review for certain buffer zone projects. Instead, MassDEP should couple any automatic approvals for work in the outer buffer zone with performance standards that prevent all buffer zone projects from altering adjacent wetlands and provide for especially strong restrictions on projects in the inner 50 feet of the buffer zone.

One option for more effective regulation of buffer zone activity would be to create a new Presumption of Significant Adverse Impact for activities (other than specifically defined "minor activities"). These provisions could be stronger in the Inner Buffer Zone and would encourage projects to avoid and/or minimize work in this area. Activities that take place within the inner 50 feet of the Buffer Zone would be presumed to result in significant adverse impacts and the burden of proof would be on an applicant to demonstrate that the project will not:

- Result in erosion and sedimentation into adjacent wetlands and water bodies;
- Reduce shading to adjacent wetlands and water bodies;

- Reduce input of leaf litter and woody debris to adjacent wetlands and water bodies;
- Reduce the capacity of the buffer zone to detain, filter and infiltrate runoff;
- Reduce the capacity of adjacent wetlands and water bodies to support wildlife (through the provision of essential upland habitat characteristics required by wildlife utilizing the adjacent wetlands or water bodies); or
- Create barriers to movement of wildlife through the buffer zone or from one wetland to another.

MACC recommends that the following conditions be a part of any expanded buffer zone Minor Activity exemptions or other automatic approvals.

- a. Such approvals should not apply to:
 - Steep slopes;
 - Water Protection Zones A, I and II;
 - Buffer zones in or adjacent to Priority or Estimated Habitat, or Habitat of Potential Regional or Statewide Importance; or
 - Any project that involved activity (including the discharge of stormwater) in the inner 50-foot area of the buffer zone or within any resource area.
- b. There should be a limit to the percentage of the buffer zone that can be converted to impervious surfaces.
- c. Projects that trigger the stormwater standards should continue to require individual permit review. This is necessary to ensure the accuracy and adequacy of stormwater analysis and management provisions, as well as to provide a permanent record of stormwater management structures not be regulated in the future as resource areas.

As an alternative to a buffer zone general permit, MACC urges MassDEP to consider expanding the exemption for certain Minor Activities when they occur more than 50 feet from wetlands and water bodies (*de facto* exemptions such as now exist in the regulations for unpaved private trails and limited vista pruning with specific, objective conditions stated in the regulations). We believe that focusing buffer exemptions on truly minor activities significantly reduces the risk of environmental harm and is preferable to a general permit for a much broader list of activities in the outer 50 feet of the buffer zone. This alternative would meet MassDEP’s objectives for this item, i.e., reducing staff time spent on appeals of buffer zone projects while benefiting the environment by “providing incentives for applicants to concentrate their activity greater than 50’ from the resource area.”

7. Wetlands: Exemptions for Regulated “Resources” Created by Stormwater Management Structures: Support

MACC believes that the WPA regulations should not impose restrictions on artificial conveyances constructed in uplands for purposes of stormwater management that prevent them from being maintained to serve their stormwater management functions. Nor do we

believe that applicants should be free to alter or destroy such areas in ways that are inconsistent with their stormwater management and resource protection function. MACC is not opposed to extending the provisions of 310 CMR 10.02(3) to structures constructed prior to 1996 provided that the same conditions would apply.

8. Expedited Permitting for Ecological Restoration Projects, e.g. Dam Removal, Inlet Widening, Stream Daylighting, etc.: Strong Support

MACC strongly supports ecological restoration and is in favor of expedited permitting for *bona fide* ecological restoration projects. We look forward to providing further input and reviewing the details of a proposed expedited permitting process.

9. Wetlands: Limited Project Status for Renewable Energy Projects: Oppose/Possible Qualified Support

While MACC supports renewable energy development, especially when it displaces nonrenewable sources of energy, MACC opposes the development of non-water dependent projects in specific resource areas, including, but not limited to, salt marshes and bordering vegetated wetlands. MACC needs sufficient detail before we can comment further on this proposal. For example, MassDEP does not provide evidence in its Draft Plan showing that removing regulatory impediments to renewable energy projects will not create new impacts to critical natural resources. Moreover, MassDEP does not explain why a new limited project status for renewable energy development will reduce MassDEP time spent on such projects. Finally, the Draft Plan does not prove the need for such reform. Instead, MassDEP proposes a new limited project status for wind and solar energy projects that qualify for Renewable Energy Credits, including utility and access requirements, however there are already limited project provisions for projects requiring access roads across wetlands to gain access to upland sites for development, and for utilities including electric distribution or transmission lines.

In short, this proposal seems driven by considerations of promoting alternative energy sources rather than by actual examples of difficulties or inabilities siting, constructing, maintaining or operating energy installations. MACC acknowledges the possibility of qualified support for this proposal if these deficiencies are rectified.

10. Wetlands, Chapter 91, 401: Improved Regulatory Mechanism for Approving New Energy Technologies – Other New Technologies: Partial Support

Imagining what new energy technologies may arise in the coming years is difficult. Similarly it is difficult to anticipate the costs and benefits of projects such as energy generation from tides or ocean currents. As such we are generally supportive of policies that may allow a limited number and scope of such projects to proceed on an experimental basis until such time as their benefits and impacts are better known, provided that those projects are carefully reviewed and permitted.

Other Suggestions for Regulatory Reform

1. Create a new exemption for routine activity in order to maintain land in its current use (define routine activity and current use).
2. Codify the exemption for maintenance and repair (but not expansion) of lawfully existing structures (codify the *Bourne vs. Austin* court decision and define maintenance, repair, lawfully existing and structures).
3. Examine the MassDEP management structure and make changes to maintain a reasonable balance between management and field staff, and
4. Increase reliance on information technology data gathering and analysis.

Conclusion

MACC supports MassDEP's general principles and proposals in the Commissioner's Draft Action Plan for Regulatory Reform. However, MACC is concerned about the degree to which MassDEP's oversight roles can be further reduced without compromising core environmental protections. We are also concerned that specific proposals will reduce or eliminate public process and will create inconsistencies and new regulatory hurdles for Conservation Commissions, especially in communities with no professional staff and few technical or legal resources.

MACC remains committed to continuing to help MassDEP find creative ways to perform its duties and we will continue to fight - as we do each year - for an increase in MassDEP's annual operating budget and retention of agency revenue. We look forward to working in partnership with MassDEP as the current process goes forward.

Please call with questions or comments at 617-489-3930.

Thank you again for this opportunity to comment.

Sincerely,



Patrick Garner
President



Linda Orel
Executive Director