Environmental League of Massachusetts

Advocacy Collaboration Results

Rachel Madden
Undersecretary Executive Office of Administration & Finance
State House, Room 373
Boston, MA 02133

Re: Executive Order # 562
CC: Secretary Matthew Beaton, Executive Office of Energy and Environmental Affairs

December 4, 2015

Dear Undersecretary Madden:

The Environmental League of Massachusetts welcomes the opportunity to weigh in on regulations as the Baker administration conducts its regulatory review under Executive Order 562.

As a convener of the EO 562 Coalition, comprised of more than 80 organizations seeking a fair, inclusive, transparent process, we are pleased that the administration has been receptive to a number of our suggestions including revising the public comment form to accommodate a broader range of comments and making all public comments available. We also appreciate the listening sessions the agencies have hosted throughout the state. While we support regular and objective regulatory reviews, as we have stated previously, we have concerns about language in the Executive Order that targeted regulations that exceeded federal requirements. The Commonwealth has benefited greatly by determining our own standards that meet our needs in healthcare, biotech, energy efficiency, environmental protection, and consumer protection. It would be a grave mistake to rely upon "default" federal standards often intended as a minimum floor, not a ceiling. Particularly in the environmental arena, our strong environmental protection policies have served us well. When compared to other states, we see that the Commonwealth's economy has outpaced many others' and has not suffered because we protect our natural resources and public health.

In addition, we find "…no adverse affect on MA citizens or customers or on the competitive environment of the Commonwealth" to be overly broad, vague and subjective language. Many regulations, by definition, affect someone's competitive environment. Some regulations were developed to protect the most vulnerable in our society and are not readily evaluated in terms of our "competitive environment" or any other "cost/benefit" analysis. Without greater clarification, this language could put many important regulations at risk. Below are our comments pertaining to specific regulations. We look forward to continuing to be part of the regulatory review process to help safeguard the public from environmental degradation.

Department of Environmental Protection (MassDEP)

Regional Greenhouse Gas Initiative (RGGI) 310 CMR 7.70

We encourage the administration to update the Regional Greenhouse Gas Initiative (RGGI) to encourage innovation and pollution reduction in our power sector in line with the EPA's Clean Power Plan. RGGI has been a resounding success for consumers and for the environment. A recent study by the Analysis

Group found that RGGI has brought almost $250 million in net economic benefits to our state from 2012-2014 alone. The state should continue to support this vital program to reduce greenhouse gas emissions and work with other states to curb carbon emissions.

State Board of Building Regulations and Standards 780 CMR
We urge the administration to support a strong and progressive building energy code. Building energy codes represent a cost-effective and proven strategy for reducing energy consumption and managing energy costs for Massachusetts residents. The U.S. Department of Energy recently estimated that the life-cycle savings for moving from the 2009 residential model code to the 2012 residential model cost will be over $6,500 in energy cost savings per building over 30 years. A strong base code was a major contributor to Massachusetts once again ranking #1 in the national Americans for an Energy Efficient Economy (ACEEE) Scorecard this year.

We are concerned that the administration is proposing only a limited update to the "stretch energy code," which has been adopted by 150 communities across the state. The stretch code option enables communities to pursue deeper energy savings in their buildings. The new proposed stretch code by the Board of Building Regulations and Standards applies only to buildings larger than 100,000 square feet, covering a small portion of communities statewide. The stretch code should instead be applied to all new residential and commercial buildings to send a signal that we can and should achieve continually improved energy performance in our building stock.

Hydropower Eligibility for the Renewable Portfolio Standard 225 CMR 14.05
We are aware of comments from hydropower developers seeking to alter the eligibility criteria for small hydropower facilities for the Renewable Portfolio Standard. Currently, hydropower facilities of up to 30 megawatts (MW) qualify as an RPS Class 1 generation unit if they are certified by the Low Impact Hydropower Institute (LIHI). LIHI certification ensures that hydropower facilities incentivized by the RPS are environmentally preferable and avoid harm to rivers. Removing or altering LIHI certification risks encouraging the construction of new dams or slowing down the removal of existing dams. We encourage you to retain this important criteria that strikes a balance between preserving our water and wildlife habitats and energy generation from small hydropower facilities.

Water Management Act (M.G.L. Chapter 21G) 310 CMR 36.00
The Water Management Act regulations were recently revised, the result of an intensive EOEEA-led process (the Sustainable Water Management Initiative, or “SWMI”) that lasted from 2010-2014. While litigation provided the impetus for the revisions, the reason for the change (and for the litigation) was that without any regulatory curb on water allocations, a number of rivers and streams in Massachusetts were experiencing low flows or running dry in certain months due to excessive water withdrawals. To ensure water sustainability, the state had to rethink its system of water allocation to better balance human and environmental water needs.

A number of significant compromises were made during the development of the new regulations and guidance to assuage water suppliers’ or agency concerns.

As the program has just started to be implemented, it does not make sense to review the regulations at this time. Rather we recommend that in a few years, MassDEP should review actual permit outcomes to evaluate both their environmental benefits and added costs, if any, to the communities.

Waterways Chapter 91 310 CMR 9.00
The Commonwealth's primary tool for protection and promotion of public use of its tidelands and other

waterways is Massachusetts General Law Chapter 91, the waterways licensing program. The Commonwealth formally established the program in 1866, based on the "public trust doctrine," a legal principle that dates back nearly 400 years, which holds that the air, the sea and the shore belong not to any one person, but rather to the public at large.

Chapter 91 regulates activities on both coastal and inland waterways, including construction, dredging and filling in tidelands, great ponds and certain rivers and streams. The Legislature amended Chapter 91 in 2011 with a new Section 18C allowing DEP to create the General License for non-commercial, water-dependent, small scale docks, piers and similar structures. DEP again amended the waterways regulations in spring 2014, creating eligibility criteria, general performance standards, and procedures for certification and renewal. Through Chapter 91, the Commonwealth seeks to preserve and protect the rights of the public, and to guarantee that private uses of tidelands and waterways serve a proper public purpose.

More than ever, Chapter 91 is vital because many of the fastest growing regions of the state, such as Boston, the North Shore, South Shore, Cape Cod, and the Islands are coastal areas. In these coastal areas, Chapter 91 regulations serve to protect traditional maritime industries, such as fishing and shipping, from displacement by non-marine related commercial or residential development.

These coastal areas are also increasingly important in light of the emerging science on expected rates of sea level rise and the need for natural resiliency of coastal areas to adapt to climate change. Projections for sea level rise for Boston range from 2 feet to as much as 6 feet by the end of the century. One could argue that development projects in filled or flowed tidelands; in, on or over Great Ponds; or in, over or under certain non-tidal, navigable rivers or streams should be undergoing more, rather than less, review in the coming years.

Perhaps the most visible, recent testament to the critical importance of the Chapter 91 regulations appeared recently in a Boston Globe article dated July 21, 2015 praising the work of Boston Harbor leader Vivien Li (www.bostonglobe.com/business/2015/07/21/vivien-longtime-harbor-advocate-leaving-boston/D4bMO167cg9HCJKhvvDbN/story.html). According to the Globe, "Li convinced many in Boston's business community that what was good for the public and the harbor was also good for their bottom line." Developer John Drew said "Some people thought there would be security problems if the waterfront was open to the public, but quite frankly, that never happened. What has happened is that property values have gone up. The ability to walk around, use the buildings, go to restaurants – she was a major contributor to creating that whole atmosphere." Vivien Li said, "Now you see lots and lots of families all of different backgrounds and income levels and races enjoying the waterfront together, and doing it all for free." Chapter 91 and the Department of Environmental Protection's implementing regulations at 310 C.M.R. 9.00 ensure the public has access to these amenities.

Given the recent amendments to the Chapter 91 regulations, the high level of public and economic benefits derived in Boston and other coastal areas from public amenities required by Chapter 91, and the need for increased coastal resiliency in light of climate change, the Chapter 91 regulations should be maintained to ensure protection of the public trust.

Wetlands Protection Act 310 CMR 10.00

Massachusetts is a leader in protecting wetlands. The Massachusetts Wetlands Protection Act (WPA), MGL c.131 § 40, enacted in 1972, was the first comprehensive state wetlands protection law in the United States. It combined and expanded on two earlier state laws that regulated filling coastal and inland wetlands. The WPA, amended numerous times since its initial enactment in 1972, remains one of

the most effective such laws in the U.S. for protecting this critical natural resource. Wetlands are critical natural resources. They protect and improve water quality (including the drinking water for much of Massachusetts), provide opportunities for boating, fishing, birding, swimming, and other recreation, support active fisheries, and are home to native animals and plants, including rare and endangered species that would go extinct if not for wetlands. With a changing climate and rising sea levels, the ability of wetlands to absorb carbon and storm water and buffer us from floods is especially significant. Wetlands and open spaces are part of the web of life that supports and protects us all, locally and globally

The WPA is a good example of partnership between the state and municipalities. Local conservation commissions in each of the 351 cities and towns in Massachusetts administer the WPA. Persons wishing to work in or alter wetlands or wetland resource areas must request and receive an approval (a permit known as an Order of Conditions) from the local conservation commission to do that work or alteration. The conservation commission must apply the requirements of the WPA and regulations to determine whether a proposed activity is subject to state wetlands requirements, whether the activity would be consistent with the requirements and protect wetland interests, and how to condition approval of the work. They then monitor the work to determine if it is being done appropriately and in accordance with required conditions.

MassDEP recently reviewed the wetland regulations with an eye to efficiency and effectiveness and in October 2014 promulgated significant changes to the regulations, streamlining and updating procedures where appropriate. Notably, those regulation amendments created a general permit for ecological restoration projects, allowed for the permitting of test projects, and expanded the types of activities that can proceed under limited project status.

This year, MassDEP completed working with an advisory committee on whether to adopt regulations for Land Subject to Coastal Storm Flowage, the one resource area designated by the WPA without performance standards. Having regulatory requirements for that resource area --- especially ones that take into account sea level rise predictions -- would assist coastal conservation commissions in implementing the WPA, help protect our coastline, and reduce the level of uncertainty that now accompanies proposals for projects in coastal areas subject to flooding.

Given the recent amendments to the WPA regulations, , we recommend against further changes to the regulations through E.O. 562 review with two exceptions:

1) MassDEP should propose regulations, including performance standards, for Land Subject to Coastal Storm Flowage. As discussed above, those regulations would provide consistency, certainty, and coastline protection and should take into account predictions of sea level rise; and

2) MassDEP should convene an advisory committee to review whether and how it might update its wetlands guidance or wetlands regulations relating to wildlife habitat. The current regulations and guidance on that topic may need more clarity and closer alignment with the science.

Toxics Use Reduction 310 CMR 40:00, 41:00, 50:00

Massachusetts has reaped significant benefits from the work of the TURA Program over the past 25 years, and it is long past time that the fees are adjusted for inflation so the program can continue to function well and be responsive to its constituents.

The accomplishments of the program as outlined in Toxics Use Reduction Act Fees: Summary of Recommendation, prepared by TURA Partners, are impressive. Large Quantity Toxics Users reduced their toxic chemical use by 40% and 23% in the first 10 and second 12 years of the program respectively

-- a significant accomplishment. That chemical releases were reduced by 90% and 73% during the same respective periods is astonishing. And, furthermore, that these accomplishments have been accompanied by cost savings and improved competitive advantage for the businesses involved is a real testament to the fact that this is a program that is beneficial to a wide range of interests and should be fully supported and maintained as originally intended.

In addition to the successes in working with Large Quantity Toxics Users, the Program's support of Toxics Use Reduction projects undertaken by small businesses, local governments, and non-profit organizations also provides significant benefits to the Commonwealth. For example, the Community and Small Business Grant Program has resulted in the development of innovative green cleaning programs, municipal pesticide reduction activities, education of youth—who are in a vulnerable window of their development--about toxics in personal care products, reductions in use of toxic brake cleaners and other hazardous chemicals in auto body shops, improved ventilation and safer practices in nail salons, transitions from toxic perchloroethylene use in dry cleaning to safer wet cleaning, and more. These projects take a relatively small amount of resources, yet have resulted in real reductions in exposures to toxic chemicals for Massachusetts residents and workers. Furthermore, they serve as models, or incubators, for strategies that can be employed elsewhere.

TURA program fees have not been increased since they were first set in 1991, despite the fact that an annual increase is statutorily mandated. Massachusetts should immediately act to bring TURA program fees into compliance with Massachusetts law. As stated above, the TURA Program has had significant successes which have resulted in improvements to public health and environmental health while generating cost savings for businesses. However, with the income remaining constant while costs increased over time due to inflation, the Program partners have had to cut back on staff and other initiatives, thus reducing their ability to be effective.

Executive Office of Energy and Environmental Affairs (EEA)

Provisions for Recycling of Beverage Containers 301 CMR 4

The Massachusetts Beverage Container Recovery Law (more commonly referred to as the Bottle Bill), enacted in 1982, remains overwhelmingly popular with the people of Massachusetts, in spite of the failed effort to expand the law in 2014 by ballot measure. The bottling industry and some supermarkets remain opposed to the law, but aside from complaints about the handling fee (301 CMR 4.05(2) and 4.05(4)), we are unaware of significant complaints about the regulations themselves.

Given that the Bottle Bill is law and therefore not subject to EO 562, any objections to the existence of the Bottle Bill per se are irrelevant to the EO 562 regulatory review. We believe that the current Bottle Bill regulations, 301 CMR 4.00, work well: they are efficient, fair, clear, and effectively carry out the intent of the General Court. We do not believe any changes to these regulations are warranted.

As to complaints by industry about the handling fee (301 CMR 4.05(2) and 4.05(4)), the current fees of 2.25 cents per container for dealers and 3.25 cents for redemption centers are barely high enough to cover the costs of these operations. The dealer fee has not been increased in 24 years. The redemption center fee had not been increased for 22 years until it was increased from 2.25 cents to 3.25 cents in 2013. EOEEA increased the per-container fee for redemption centers after reviewing evidence that redemption centers could not afford to operate at the prior handling fee rate: from 1995 to 2010 the number of redemption centers in Massachusetts dropped from 216 to 80, entirely due to the insufficiency of the handling fee. Given the large profit margin for beverages sold in Massachusetts, and the fact that the current handling fee is barely adequate to cover the costs associated with handling returned beverage containers, the handling fee should not be reduced.

Interbasin Transfer Act 313 CMR 4.00

We do not support weakening of Interbasin Transfer Act regulations. The Interbasin Transfer Act (IBTA) of 1984 is a time-tested framework that has benefitted the entire state for almost three decades. It applies to all transfers of water and wastewater throughout the state. The intent is to keep water local, one of the core environmental principles of Massachusetts water policy. Water transfers approved under the act are permanent, so it is important to do so carefully.

- The IBTA is not a roadblock. Most requests for transfer take 3-4 months unless the applicant requests an extension. Once the transfer has been voted through the Water Resources Commission, the decision is final.
- The IBTA provides transparency and accountability to the process of moving water from one basin to another by including input from the public, other agencies and organizations.
- The IBTA process ensures that transfers of vital and finite water resources receive the scrutiny they deserve. The process and the experienced staff that implement it do a thorough job and are available to any individual or entity needing assistance with compliance.

Department of Conservation and Recreation (DCR)

Watershed Protection 350 CMR 11.00

The Watershed Protection Act (WsPA) regulates land use and activities within critical areas of the Quabbin Reservoir, Ware River and Wachusett Reservoir watersheds for the purpose of protecting the quality of drinking water. We understand there have been requests to allow single track biking in the Quabbin Reservoir. Given that these reservoirs provide drinking water for 2.5 million people, and their management is governed by stringent state and federal regulations designed to protect water quality, including EPA's Surface Water Treatment Rule and the Massachusetts Watershed Protection Act, we urge the state not to allow this use at the Quabbin.

DCR carefully considers requests for recreational use of this land and allows limited compatible uses, such as boating. Mountain biking in the Quabbin is not compatible with the watershed's use for water supply for the Greater Boston area and could threaten its legal status as an unfiltered water supply, requiring the MWRA to invest in extremely expensive filtration.

Department of Fish & Game

Massachusetts Endangered Species Act (M.G.L c.131A) 321 CMR 10.00

The Massachusetts Endangered Species Act, also known as MESA, and its implementing regulations at 321 CMR 10.00 are administered by the Director of the Division of Fisheries and Wildlife within the Department of Fish and Game. MESA was enacted in 1990, implementing regulations were promulgated in 1992, and the regulations were most recently revised in 2010.

MESA protects rare animals and plants and their habitats by prohibiting a "take" of animal or plant species listed as Endangered, Threatened, or Special Concern through a scientific and public review process administered by DFW and overseen by the Fisheries and Wildlife Board. If a project falls within Priority Habitat of state listed species and does not qualify for any of 18 categories of exemptions specified in the regulations, then project proponents must file for project review through DFW's Natural Heritage and Endangered Species Program. The majority of projects that undergo project review either are determined to be a "no take" or "conditional no take," not requiring a permit. A small number of projects reviewed each year are required to obtain a Conservation and Management Permit.

The critical importance of MESA is highlighted in the recent draft State Wildlife Action Plan put out for public comment by the Baker Administration. The SWAP identifies 555 Species of Greatest

Conservation Need, including 163 vertebrates, 111 invertebrates, and 281 plants. Not surprisingly, many of the conservation actions that the draft SWAP recommends depend upon a robust scientific and regulatory program under MESA and its implementing regulations.

The Supreme Judicial Court recently **upheld** MESA regulations [Pepin v. Division of Fisheries and Wildlife, 467 Mass. 210 (2014)], namely DFG's authority to regulate endangered species protection on land designated as "Priority Habitat." In light of the recent amendments to the MESA regulations, the continued decline of many animal and plant species in Massachusetts, and our moral obligation to prevent the extinction or extirpation of other species, the MESA regulations should not be weakened.

Department of Agricultural Resources

Agricultural Preservation Restriction Program (APR) 330 CMR 22

Since its inception in 1978, the APR program has permanently protected more than 70,000 acres of the Commonwealth's most productive agricultural land. In the process, by buying agricultural preservation restrictions from willing landowners, the program has helped farmers reinvest and expand their farm businesses, given them a way to transition the farm to a next generation, and helped them finance retirement or other family needs. The program has also been critically important for farmers seeking to establish or expand a farm operation, by keeping farmland prices at their agricultural value.

The program is one of the most cost-effective programs within the Executive Office of Energy and Environmental Affairs. Virtually every APR project is cost-shared on a one-to-one basis with the federal Farm and Ranch Lands Protection Program (FRPP). Since FY08, Massachusetts has received over $33 million in matching funds for the APR program through the FRPP. Additional funds are leveraged through contributions from local communities and land trusts, and from bargain sales by farmland owners. With the increased interest in healthy, locally grown food, along with the need to support Massachusetts farmers, we urge the administration to keep strong APR regulations in place.

Thank you for your consideration of our comments. We welcome the opportunity to work with the Baker administration to improve regulations so they are clear and carry out the legislative intent of the statutes on which they are based. The above-mentioned regulations play an important role in protecting the Massachusetts environment, making for a healthier Commonwealth today and preserving resources for future generations.

Please contact us if you have any questions.

Sincerely,
Nancy Goodman
Vice President for Policy