Mass Audubon

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October 2, 2015

Secretary Matthew A. Beaton, Secretary
The Commonwealth of Massachusetts
Executive Office of Energy and Environmental Affairs
100 Cambridge St., Suite 900
Boston, MA 02114-2119

Re: Executive Order No. 562

Dear Secretary Beaton:

Thank you for the opportunity to comment on *Executive Order Number 562* (EO) issued by Governor Baker on March 31, 2015. Mass Audubon supports periodic transparent public review of state agency regulations which play a significant role in protecting the public health, safety, environment, and welfare of the residents of the Commonwealth.

I. Background

As you know, the EO calls for Commonwealth agencies to undertake a systematic review of each of its regulations, and requires that only those regulations "mandated by law or essential to the health, safety, environment or welfare of the Commonwealth's residents shall be retained." Regulations that do not meet this threshold are subject to sunset as of March 31, 2016. The EO enumerates seven criteria to determine whether a regulation meets the standard of "essential to health, safety, environment or welfare," including that there must be a clearly identified need for governmental intervention that is best addressed by the agency, the costs of the regulation cannot exceed the benefits, and, most controversially, the regulation cannot exceed federal requirements or duplicate local requirements.

As the following chronology demonstrates, Mass Audubon has been actively engaged and communicative with the Baker Administration on the EO:

- April 6, 2015 - In an email to you, Mass Audubon first expressed concerns regarding the background of the EO and what its impacts might be on Executive Office of Energy and Environmental Affairs (EEA) regulatory agencies.
- April 21, 2015 - In response to the issuance of the EO, and in tandem with other environmental and advocacy groups, a group of us met at the State House offices of the Executive Office of Administration & Finance (A&F) with the Governor's chief of Staff Steven Kadish, A&F Undersecretary Rachel Madden, and others to express our concerns regarding the need for an open and transparent process for regulatory review and that the

administration not reduce or eliminate the strong standards presently in place to protect the public health, safety, environment, and welfare of the inhabitants of the Commonwealth.

- April 27, 2015 - We wrote to Attorney General Maura Healey office expressing our coalition's deep concerns over the significant differences in language between the EO and previous regulatory reviews.
- April 28, 2015 - As members of a broadly based coalition representing residents across the Commonwealth involved in business, labor, public health, environmental protection, human services and consumer protection, we wrote to A&F Undersecretary Madden indicating that we fully supported regular and objective regulatory reviews, as have been performed during the administrations of Governors Weld, Romney, and Patrick, and agreed that regulations should be clear, concise, and effective in accomplishing the objective for which they were intended.
- July 20, 2015 - We wrote to Governor Baker, as part of a 75+ member group, expressing our strong interest in working closely with the administration on the implementation of the EO. This group represented a broad range of constituencies actively involved with the Commonwealth's business, labor, consumer, public health, energy, environmental protection, elder care, housing, poverty and social service issues and expressed concern that the EO mandates an unprecedented set of criteria for evaluating current regulations that may have unanticipated and long-lasting negative consequences for the Commonwealth.
- July 29, 2015 - On behalf of the Governor, A&F Undersecretary Madden wrote to thank us expressing an interest in continuing to work with our group.
- August 4, 2015 - The Governor's Office of Constituent Services acknowledged receipt of our most recent letter to the Governor.
- September 11, 2015 - A&F Undersecretary Madden assured us of open stakeholder engagement that would be part of the EO review.

II. Principles for Review

At the April 21st State House meeting in the offices of A&F, Mass Audubon recommended to A&F Undersecretary Madden and Steven Kadish that the Administration adhere to set of nine "guiding principles" used by the Commonwealth during an oversight review of Department of Environmental Protection (DEP) regulations. Mass Audubon participated in that review (*Regulatory Reform at MassDEP, March 2012*). Because of the proven success of the principles in guiding a wide array of stakeholders, we recommend that EEA employ them in this EO agency regulatory review. They are in part as follows:

- *Proposed reforms will not weaken or undermine environmental protection standards. Changes that reduce direct oversight will be coupled with robust compliance and enforcement mechanisms.*
- *Proposed regulatory or permitting changes are aimed primarily at helping* (agencies) *...manage...responsibilities within...current staffing levels, and every proposed reform measure will result in some time savings for the agency.*
- *All identified reforms can be implemented directly by* (agencies)*...without the need for legislative changes.*
- *None of the proposed reforms will transfer new responsibilities to municipalities, as our cities and towns are also strained by budget decreases.*

- *None of the proposed reforms will alter our obligations under our federal funding agreements with...*(federal agencies)*...and therefore proposed reforms are largely concentrated on "state-only" programs...*
- *None of the proposed reforms are intended to reduce public process, and no reforms to appeals processes have been proposed.* (Agencies are)*...committed to maintaining opportunities for public involvement and to upholding established rights to citizen appeals...*
- *Many of the proposed reforms incentivize better environmental outcomes by reducing permitting procedures for environmentally beneficial projects or for avoiding areas with sensitive environmental resources.*
- *Many of the proposed reforms seek to eliminate duplication in current permitting reviews. Some of the proposed ideas eliminate duplication within* (agencies')*...own programs, and several others reduce duplication with municipal approvals.*
- *Several of the selected reforms seek to reduce direct staff oversight of activities that are routine and that do not pose the most significant environmental protection concerns. This will allow* (agency)*...staff to instead focus on those activities that deserve the most scrutiny. As noted..., changes to reduce direct oversight (e.g., moving from an individual to a general permit process and shifting oversight to external third parties) will be coupled with robust oversight and enforcement measures.*

These principles are well-founded and ensure that the important public health, safety, and welfare benefits of regulations are upheld while providing clear and consistent standards that do not impose undue burdens on municipalities, regulated entities, or other affected parties.

III. Legal Analysis

As the state-federal legal issues are of most concern to Mass Audubon, we devote the largest portion of these comments to the legal matters.

The following is a legal analysis of the EO. In Part IV of these comments, we make the case below that the EO violates the doctrine of separation of powers that is expressly set forth in the Constitution of the Commonwealth of Massachusetts. We further illustrate the ambiguity and vagueness of the EO, which we believe to be a valid concern, though we believe it to be less persuasive than the points discussed in Part IV.

IV. Separation of Powers

A. Executive Encroachment into Legislative Function

Perhaps the most compelling argument is that the EO violates the separation of powers doctrine explicitly prescribed by the Massachusetts Constitution.

As a threshold matter, the Governor's power to issue executive orders is derived from Part I, Chapter II, Section I, Article I of the Massachusetts Constitution, which states that "there shall be a supreme executive magistrate, who shall be styled, The Governor of the Commonwealth of Massachusetts; and whose title shall be – His Excellency." In issuing the EO, Governor Baker

has evoked the inherent authority vested in him as supreme executive magistrate, which many Governors before him have done.[1]

The use of executive orders by Massachusetts governors to influence policy has increased significantly in recent years. Despite this rise, there have been relatively few occasions for the Massachusetts Supreme Judicial Court (SJC) to rule on executive orders, and therefore case law and authority regarding executive orders is sparse and many questions on the constitutionality of executive orders and other executive action remain unanswered.[2] However, there is authority setting the boundaries of the Separation of Powers doctrine.

Part I, Article XXX ("Article 30") of the Massachusetts Constitution sets forth the separation of powers doctrine and states that "in the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men." The SJC has interpreted Article 30 in a flexible and permissive manner.[3] Despite acknowledging that "the concept of a separation of powers is fundamental to our form of government" and that "the Massachusetts version...on its face calls for a complete and rigid division of all powers among the three branches," the SJC has stated that "we recognize that an absolute division of the three general types of functions is neither possible, nor always desirable."[4] The SJC has stated that agents of one branch can act as agents of another, and that some flexibility in allocation of functions is desirable so long as it "creates no interference by one department with the power of another."[5] In a 2000 case, the SJC stated that "an act of one branch of government does not violate constitutional separation of powers provisions unless the act unduly restricts a core function of a coordinate branch. The essence of what cannot be tolerated is the creation of interference by one department with the power of another department."[6] Ultimately, the SJC approaches Article 30 with flexibility, and appears to recognize that any separation of powers analysis requires a balancing act.

Considering the SJC's flexible approach, a move by the Governor to adjust the balance at the margin would quite possibly be legal and appropriate. However, a dramatic move by the Governor to upset the balance by severely limiting the authority of the legislature, or chilling its exercise of authority, is not within the acceptable limits that the SJC has contemplated. The criterion in the EO requiring Massachusetts regulations not to exceed federal standards violates the separation of powers because it operates as a real limitation on the operation of legislation that the legislature has adopted and might adopt in the future. Most modern legislation relies heavily on regulations adopted by the executive branch to be effective, and it is an enormous curtailment of legislative power to effectively restrict the legislature to either adopting self-implementing legislation (without the need for relevant agencies to adopt regulations) or legislation that does not contemplate regulations that go beyond federal standards. If the legislature desired to limit regulations to be no stricter than federal standards, it could do so by

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[1] For a discussion of the basis of authority for formal gubernatorial executive orders, see 38 Mass. Practice s. 52.
[2] 38 Mass. Practice s. 53.
[3] For a summary of certain case SJC case law regarding separation of powers and the constitutionality of executive orders, please see Appendix A.
[4] Opinion of the Justices, 365 Mass. 639 (1974).
[5] Id. at 639-40; *see also* Babets v. Secretary of the Executive Office of Human Services, 403 Mass. 230, 233 (1988) (separation of powers forbids interference by one branch with the "power or functions" of another).
[6] Commonwealth v. Gonsalves, 432 Mass. 613, 619 (2000).

statute. Indeed, a number of state legislatures have done exactly that.[7] However, when statutes do not provide for such a cap, it is not within the power of the Governor to impose one unilaterally. Under the SJC's standard, the EO unduly restricts and interferes with a core function of the legislature.

Indeed, the SJC has made clear that it will strike down executive action as a violation of Article 30 when it encroaches upon legislative power. The SJC has stated, in response to a challenge to executive action, that the Governor has "no inherent legislative power,"[8] and that "any effect through executive action to modify the policy [established by the legislature] would be an unconstitutional executive encroachment upon legislative power."[9] Ultimately, the SJC may strike down executive action if such action interferes with the legislature's power to determine which social objectives or programs are worthy of pursuit or if the Governor is not executing the law as it has emerged from the legislative process, as he is obliged to do.[10] The Governor, the SJC has stated, is obligated to apply his full energy and resources and those of the executive branch to ensure that the intended goals of legislation are effectuated.[11]

B. Administrative Procedures Act

Another separation of powers problem presented by the EO is that the Administrative Procedure Act, Mass. General Law c. 30A (APA) already sets forth a comprehensive framework for the promulgation and periodic review of agency regulations, and the Governor does not have the authority to change individual parts of that legislatively-enacted process. Specifically, the APA already provides for cost/benefit analyses (the Fiscal Effect Statement (MGL c. 30A, §5) and the Small Impact Business Statement (MGL c. 30A, §§ 2, 3, 5, 5A)) and mandatory review of regulations at least once every 12 years (MGL c. 30A, §5A). In attempting to modify the framework laid out in the APA, for example by instructing agencies to determine whether "there is a clearly identified need for governmental intervention that is best addressed by the Agency and not another Agency or governmental body" and whether "the regulation does not unduly and adversely affect Massachusetts citizens and customers of the Commonwealth, or the competitive environment in Massachusetts", the Governor is effectively amending existing legislation, which is not within his authority.

If the EO only required *ex post facto* review of existing regulations, I suppose one could argue that the EO would not be offensive to the APA, as the APA is concerned primarily with *ex ante* procedure. However, the EO, in Sections 5 through 8, also applies to future regulations. Thus, in adopting new regulations, agencies must now meet the criteria and procedural requirements of both the APA and the EO. The Governor is entering a space where the legislature has already "covered the waterfront" and is imposing requirements that overlap and exceed those included in the statute. Even ignoring the separation of powers infraction, Mass Audubon believes that this dual framework chills the operation of agencies in carrying out their regulatory responsibilities. By making the promulgation of new regulations exceedingly difficult and even temporarily

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[7] See http://www.ncsl.org/research/environment-and-natural-resources/state-agency-authority-to-adopt-more-stringent-environmental-standards.aspx for a list of state environmental statutes that restrict state agency authority to adopt environmental standards.

[8] Opinion of the Justices, 324 Mass. 736, 744 (1947).

[9] Feeney v. Commonwealth, 373 Mass. 359 (1977).

[10] Opinion of the Justices, 375 Mass. 827 (1978).

[11] Felicetti v. Secretary of Communities and Development, 386 Mass. 868 (1982).

impossible (*i.e.*, the freeze on new regulations extended indefinitely by Section 9 of EO),[12] agencies will likely resort to issuing guidance, which can be issued absent public comment or the additional safeguards built into the APA. In enacting the APA, the legislature was attempting to minimize the extent to which agencies issue guidance rather than regulations. However, by limiting the ability of agencies to adopt regulations, the Governor is using the EO to obstruct that policy decision and encouraging precisely what the legislature intended to prevent.

V. Ambiguity of EO

The fact that the EO is nearly indecipherably ambiguous has been a rallying point against EO for Mass Audubon and our colleagues. As a criteria for determining whether a regulation is "essential," the EO requires that the "regulation does not unduly and adversely affect Massachusetts citizens and customers of the Commonwealth, or the competitive environment in Massachusetts." The Governor and his Administration, however, have not provided any guidance as to what constitutes an undue adverse affect on the citizens of the Commonwealth, nor have we seen how the Administration defines its "competitive environment." Hopefully this language is simply meant to ensure that the costs of a regulation do not exceed the benefits; however, absent clarity from the Governor, this terminology remains nebulous.[13]

The reference to "customers of the Commonwealth" appears twice in the EO – initially in the recitals, which state that "the citizens and customers of the Commonwealth will be better served by reducing the number, length, and complexity of regulations, leaving only those that are essential to the public good," and again in the criteria for determining whether a regulation is essential, as quoted above. Mass Audubon notes that the term "customers" of the Commonwealth is not defined in the Massachusetts General Laws. The only potentially applicable definition for "customers" is found in the regulations of the Federal Trade Commission governing advertising allowances and other merchandising payments and services.[14] The ambiguity in this terminology further demonstrates the lack of clarity in the EO taken as a whole.

Though agency regulations can be challenged as void for vagueness under the due process clause, this standard is not applicable to executive orders. An agency rule or regulation must set forth with particularity and precision what conduct is prohibited so that persons of ordinary intelligence would have no doubt about what exactly is required to comply with the express

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[12] An additional policy concern is that EO's freeze on new regulations also indirectly impedes the functioning of the judicial branch, as cases involving state agencies cannot be disposed of through negotiated solutions. This was illustrated in a recent case where Conservation Law Foundation sued the Massachusetts Department of Environmental Protection for failure to implement regulations pursuant to the state's Global Warming Solutions Act (which required certain regulations to be in place by 2013). Were it not for EO's freeze on new regulations, MassDEP might well have agreed with CLF on a schedule for meeting the statutory targets (which compromise would be implemented through regulation). However, due to the freeze, MassDEP could not issue regulations to resolve the case. There has long been recognized a strong judicial interest in allowing litigants to settle their disputes through compromise.

[13] Under one reading, the language arguably guts the entire Order. What agency would not regard its regulations as essential to the welfare of citizens? Surely, the Governor did not intend such a reading, but the fact that it is possible arguably gives the Governor too broad a hand to decide which regulations are good and which regulations should be withdrawn under the guise of even-handed regulatory reform.

[14] 16 CFR 240.4.

terms of the rule or regulation. This standard, however, is seemingly inapplicable to challenges of executive action.[15]

VI. Additional – Protection of Public Interest Resources

Finally, Mass Audubon supports and reiterates the September 10, 2015 recommendations to A&F Undersecretary Madden made by our colleagues at the Massachusetts Rivers Alliance (of which we are a member), the Massachusetts Association of Conservation Commissions, and the Massachusetts Land Trust Coalition Alliance (of which we are a member) regarding standards for managing and protecting the Commonwealth's water resources, river basins, wetlands, and endangered species. These and other state environmental regulations protect the public interests embodied in natural resources that comprise important aspects of the "common wealth." These regulations have been carefully crafted, with substantial input from a wide range of stakeholders, to provide clear standards for protecting these shared natural resources while allowing for reasonable and appropriate uses.

The above comments are focused on the overall framework of the EO 562 regulatory review process. Mass Audubon will comment on specific proposed regulatory changes as appropriate once that information becomes available.

Appendix A

Article 30 Case Law

Separation of Powers Generally:

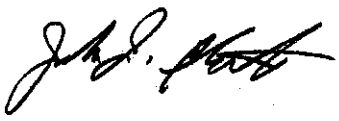
- Opinion of the Justices to the House of Representatives, 365 Mass. 639 (1974): The SJC struck down a proposed bill creating an Electronic Data Processing and Telecommunications Commission to centralize and operate data services for all branches, stating that the Commission and the centralization of services was an intrusion by the legislature and the executive on the internal functioning of the judiciary, thereby violating Article 30.
- Feeney v. Commonwealth, 373 Mass. 359 (1977): A court ruled that where legislation established a policy for the preferential hiring of veterans for the state's civil service, executive officials had an obligation to administer the policy formulated by the state legislature.
- Opinion of the Justices to the Governor, 369 Mass. 990 (1976): Where a statute required House & Senate Ways & Means Committees to verify that a "critical need" existed before certain vacancies in state positions could be filled, the court struck down the legislation as infringing upon the executive's power to appoint personnel in the executive branch.

[15] 39 Mass. Practice s. 746.

Executive Action/Executive Orders:

- MBTA Advisory Board v. MBTA, 382 Mass. 569 (1981): Where the governor allowed the operation of the MBTA despite exceeding the budget authorized by the legislature, the SJC stated that Governor could not authorize continued infringement on the legislature's statutory budget, as the executive was infringing on the legislature's ability to control expenditures (though he was permitted to operate the MBTA for the brief period necessary to convene the legislature and give them the opportunity to decide on appropriate action). The "Governor could not by executive order, in absence of legislative authority, suspend the operation of a law" (see p. 578).
- Opinion of the Justices to the Governor and Counsel, 324 Mass. 739 (1949): The legislature granted the Civil Service Commission the power to make and amend rules that regulated selection and employment of veterans, subject to the consent of the Governor. The Governor questioned whether he could not only reject a proposed rule, but replace it with his own. The SJC answered in the negative, stating that "the Governor has no inherent legislative power, and no power to enact rules has been delegated to him by statute. The rule making power is vested solely in the Commission. The power of the Governor is limited to approval or disapproval of rules or amendments made by the Commission. The governor cannot substitute an amendment of its own for an amendment submitted by the Commission" (see p. 744.)

Sincerely,



Jack Clarke
Director

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