

April 17, 2002
Robert Varney, Regional Administrator
U.S. Environmental Protection Agency
Region 1
One Congress Street, Suite 1100
Boston, MA 02114

Lauren Liss, Commissioner
Massachusetts Department of Environmental Protection
One Winter Street
Boston, MA 02108

Dear Regional Administrator Varney and Commissioner Liss,

Thank you for the opportunity to comment on the U.S. Environmental Protection Agency (EPA) Region 1 Performance Partnership Agreement (PPA) with Massachusetts Department of Environmental Protection (MADEP). Public Employees for Environmental Responsibility (PEER) has general and specific comments on the proposed PPA. These comments are set forth below:

General Comments

As you are aware, EPA and the States established the National Environmental Performance Partnership System (NEPPS) to strengthen the management, efficiency and effectiveness of the nation's environmental programs. NEPPS also provides EPA with the tools necessary to ensure federal tax dollars are being used to implement the federal statutes enabled through the PPA. The primary mechanism for implementing NEPPS is the PPA - a contract signed by both the EPA Regional office and the state DEP, to which the people of Massachusetts are a third party beneficiary. The PPA is the central document detailing environmental priorities and how the two entities will work together. A Performance Partnership Grant (PPG) is often given in conjunction with the PPA to better utilize grant money and reduce administrative burdens.

Under NEPPS, EPA and the states evaluate their results and experiences with the PPA by examining: 1) the effectiveness of the PPA (does it lead to quantifiable, improved environmental outcomes?); 2) public credibility (are the measures used to report environmental outcomes credible and reliable?); and 3) fiscal soundness and program accountability (are public monies used in an efficient, effective, and economic manner, and is it understandable to the public?). See e.g. 5 U.S.C. § 306(a) (2002); 31 U.S.C. § 115(c).

PEER does not believe that the PPA as written will lead to improved environmental outcomes, nor do we believe that the measures used to report environmental outcomes are necessarily credible and reliable. Moreover, PEER is concerned that public monies are not being used in a way that will result in the best possible environmental outcomes, and that the process is mostly hidden from the public eye.

Specifically, MADEP is receiving over \$10 million in EPA federal funds to carry out the tasks in this PPA. Given the fact that MADEP specifies very few tangible, measurable goals, it is difficult to assess what EPA is getting for its money. There also seems to be a huge emphasis on "innovative programs" and outreach, some of which have not yet been proven successful (i.e., there is no evidence that these programs yield the same or better environmental results as traditional programs). MADEP and EPA have huge backlogs of unaddressed environmental problems in several programs; until these backlogs are addressed, fewer resources ought to be spent on outreach and new, innovative programs.

It is also critical that the PPA be modified to ensure that all whistleblower protections available under federal laws delegated to DEP are made available to state employees and others responsible for implementing the federal law. Specifically, the PPA fails to provide legal protections to state employees who suffer from retaliation in response to their protected disclosures regarding federal programs delegated to the Commonwealth of Massachusetts. In the absence of equivalent whistleblower protections or a waiver of sovereign immunity so that the employee protection provisions of federal laws apply, PEER maintains that DEP is not offering an equivalent environmental program. See, e.g. 42 U.S.C. § 6926 (b) & (c) (2002). Therefore, PEER urges that the final version of this PPA state the following:

All parties agree that the Commonwealth of Massachusetts expressly waives its immunity from suit in federal court or any other federal forum, including but not limited to a federal administrative process, under the Eleventh Amendment of the U.S. Constitution. Accordingly, the Commonwealth of Massachusetts hereby submits itself to federal jurisdiction for the purpose of all whistleblower protection provisions of federal statutes applying to activities under this PPA. The purpose of this waiver is to ensure that the Commonwealth of Massachusetts administers programs comparable to those programs managed by federal agencies with original authority over the delegated programs enabled through the PPA, and that the public employees or contractors managing the programs are properly supported in the execution of federal law.

Specific comments

- **Page 8:** MADEP proposes to place "innovative programs and projects on an equal footing with established traditional core programs." MADEP does state that the "burden of proof for the success of an innovation is equivalent to ... the burden for existing programs," but also concedes that it often takes time for these innovative programs to be properly evaluated. If MADEP and EPA have the choice between putting resources into a "traditional" program that yields positive environmental results (but currently suffers from a lack of resources), and putting resources into an innovative program where it will possibly take years before you can even assess whether the program is successful, it seems as though the environment would benefit from allocating resources to the traditional program, at least until such time that backlogs have been cleared up.
- **Page 12:** MADEP states that compliance and enforcement programs must be based upon, among other things, "requirements that are enforceable," and "committing adequate staff resources ... to compliance and enforcement." In

some cases, MADEP has neither of these prerequisites (e.g., low percentage of Title V CAA permits issued; backlog of expired NPDES permits cited on page 67; 6,428 RCRA sites in need of additional action cited on page 170, etc.).

- **Page 16:** MADEP states it "anticipates" conducting over 2,400 inspections in FY 2002. It is unclear how MADEP defines an inspection (e.g., if one person does a multi-media inspection at a facility, does that count as one inspection or 3? Or, does reviewing a Licensed Site Professional report count as an inspection?). Moreover, since MADEP does not give its inspection rate for FY 2001, it is difficult to assess whether this is an increase in inspections, a decrease, or status quo. Finally, how many inspections would MADEP be doing if it was not getting over \$10 million from EPA? In other words, what is EPA getting for its money?
- **Page 20:** MADEP states that "illegal and incremental filling of wetlands are the most significant threats to wetlands today. These threats need to be eliminated in order to protect public health and the environment." With regard to the "incremental [legal] filling" of wetlands that occurs, MADEP will only be able to address this by tightening up the Wetlands Protection Act (WPA), and by addressing the inconsistent applications of the WPA as administered by the local Conservation Commissions (see page 92, where MADEP states that "it is also likely that wetlands are lost each year because of undetected violations and inconsistent administration of the regulatory programs"). Moreover, MADEP says that one of its goals is to have "no net loss of wetlands." MADEP must clarify whether this means no net loss of wetland acreage (the traditional, but faulty, way to measure no net loss), or no net loss of functions and values.
- **Page 33:** MADEP states that by the end of FY 2002, it will have approved Zone II delineations and wellhead protection measures for 100% of wells pumping greater than 100,000 gallons per day, and will close 100% of all illegal injection wells discovered within wellhead protection areas (actually, MADEP lists this last milestone twice). It is difficult to envision what amount of resources this will take, as there are no baseline statistics given for how many Zone II delineations are already approved, or how many illegal injection wells have been discovered.
- **Page 42:** MADEP needs to insert more details in the enforcement portion of its P-A-C-E-R (permitting, assistance, compliance, enforcement and regulation development) activities. For example, when MADEP states that it will "increase enforcement," it is unclear whether this means one additional enforcement inspection or case, or whether it means a 25% increase in enforcement actions. This generic "increase activities" is sprinkled throughout the PPA (see also page 44, where MADEP says it will "increase registration and oversight of previously unregistered public water supplies," page 77, where DEP promises to "conduct inspections" of NPDES facilities and "enforce on a case-by-case basis.").
- **Pages 54 - 60:** In MADEP's sections on Rivers, Lakes, and Marine Waters Assessment, there appear to be many uses that have not been rated by DEP. For example 57% of the rivers that were rated (and only 18% of the rivers in the Commonwealth were rated) were not examined for fish consumption; 84% of lakes were not rated for fish consumption; 69% of the lakes were not rated for swimming; and 79% of the marine waters were not rated for aquatic life support. Of the uses that were assessed, only 35% of river miles "fully support" their designated uses; 41% of lakes fully support their uses; and 36% of marine waters fully support their uses. Despite these statistics,

MADEP makes statements such as, "The river cleanup program has enjoyed enormous success" (page 52). MADEP also attributes this success to the Publicly Owned Treatment Works (POTWs) that treat sanitary and industrial wastewater; yet on page 10, MADEP states that it is disinvesting by decreasing the number of inspections at POTWs in order to devote more resources to innovative programs. MADEP ought to put less emphasis on innovative approaches and use more traditional approaches to fix problems such as these.

- **Page 67:** MADEP states that there is a "'backlog' of expired NPDES permits in Massachusetts." Under the section entitled, "What activities will occur in 2002 for the NPDES program?" MADEP states that it will "take responsibility" for permits in certain watersheds. The PPA does not explain how this backlog will be addressed, nor are the PPA milestones tied to addressing the backlog.
- **Page 75:** In the "Milestones" section for achieving clean water and protecting aquatic ecosystems, MADEP has no tangible goals for FYs 2002 through 2004. However, it states that by the end of FY 2005, 100% of Water Management Act permits will be reviewed for compliance, 100% of POTWs will be in compliance with certain requirements, and 100% of NPDES permittees will be in compliance with permit conditions. Since the term of this PPA is only for FYs 2002 and 2003, the actual results will not be required until after this PPA has expired. I would urge DEP to have interim milestones during FYs 2002, 2003, and 2004 which are measurable and enforceable.
- **Page 89:** MADEP states that "we do not know the current rate of wetland loss under modern and stringent regulatory requirements." One way DEP could attempt to measure this loss is to add up the permitted fills, together with unpermitted fills which have been discovered.
- **Page 92:** MADEP attempts to answer the question, "How should DEP address continued loss of wetland resources?" Although DEP states that wetlands are lost each year to undetected violations and inconsistent administration of the WPA, its proposed solutions do not clearly address these issues. For example, MADEP states it will "continue to issue Superseding Orders of Conditions" (overrule local Conservation Commission determinations), but it does nothing to address the underlying problem of rogue Commissions.
- **Pages 94 and 97:** MADEP reiterates that it will "ensure a net success rate equal to or greater than 1:1" in wetland losses associated with permitting, and replicate "any unresolved [wetland] loss on at least a 1:1 basis" in enforcement cases. Again, this is very unclear, particularly in light of MADEP's earlier admissions that "a recent study has shown that many replication areas fail to meet our regulatory criteria defining success, resulting in a greater loss of wetland resources than anticipated" (page 92). In permit cases, MADEP should resolve this by requiring any replication upfront (ensuring success before fill is allowed to be placed); in enforcement cases, MADEP should require restoration whenever possible (there is a higher success rate with restoration than with creation).
- **Page 128:** MADEP states that it will "complete Title V permits" by the winter of 2002. Given the extremely low rate of Title V permits that have been issued, it is unlikely that MADEP will be able to do this without increasing resources in this area. However, there is nothing to indicate in the PPA that additional resources will be shifted to the Title V issues.
- **Page 151:** MADEP plans to invest more resources into its Environmental Results Program (ERP), which replaces permits with industry-wide performance standards and an annual certificate of compliance. While DEP claims that this program has resulted in a "statistically significant increase in

environmental performance," it is unclear whether traditional permitting and enforcement would have yielded similar or better results.

- **Page 165:** Under the section on Waste Site Cleanup, MADEP states that "Licensed State Professionals (LSPs) manage site work and provide opinions that [the cleanup] meets state requirements - in most cases without the need for DEP's direct involvement." Connecticut uses a similar system; a non-profit group determined that the Connecticut Licensed Environmental Professionals (LEPs) have an appalling track record. In other words, the LEPs in Connecticut are asserting that clean-ups meet state standards, and they don't. There does not seem to be a similar assessment of LSPs in Massachusetts, but this type of assessment needs to be done before reliance is placed on the LSPs. MADEP states that "More than 14,000 assessments and/or cleanups (of sites or spills) have received LSP 'sign off' indicating the achievement of no significant risk or no substantial hazard" (page 167). It would be interesting to assess the LSP work, and get a sense of whether the LSPs in Massachusetts have a better track record than those in Connecticut. In fact, on page 180, MADEP states that it will "refer LSPs to LSP Board for investigation to promote LSP compliance with professional standards," an indication that some LSPs do not comply with professional standards.

PEER appreciates the opportunity to comment on the draft PPA. Please do not hesitate to contact me if you have any questions about these comments.

Sincerely,

Kyla Bennett, Director
New England PEER