New England PEER
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October 1, 2015

EO562 Input
c/o Deneen Simpson
MassDEP
One Winter Street
Boston, MA 02108

Sent regular mail and by email to DEP.Talks@state.ma.us

RE: Executive Order 562

Dear Ms. Simpson,

Public Employees for Environmental Responsibility (PEER) is a Washington D.C.-based non-profit, non-partisan public interest organization concerned with honest and open government. Specifically, PEER serves and protects public employees working on environmental issues. PEER represents thousands of local, state and federal government employees nationwide; our New England chapter is located outside of Boston, Massachusetts.

PEER is writing to express strong concerns about Executive Order 562 (EO 562). While we have no problem with a comprehensive review of regulations in order to clarify language, omit discrepancies, and rescind regulations that are outdated or superseded, we believe that EO 562 goes far beyond these goals. Specifically, the Commonwealth states in its press release that the purpose of the EO is to drive economic growth and make Massachusetts more "competitive," and baldly states that we have an "onerous" regulatory environment.[1] PEER fears that in its rush to make "Massachusetts a safe,

[1] http://www.mass.gov/governor/press-office/press-releases/fy2015/executive-order-initiating-regulatory-reform-review.html

healthy, and effective place to do business,"[2] it will make Massachusetts an unhealthy, unsafe place to live.

It is a common fallacy to think that economic growth and environmental protection are mutually exclusive. In fact, environmental protection can spur economic growth and increase job opportunities. The benefits of environmental regulations regularly eclipse the costs.[3] Unfortunately, it is often difficult to measure the benefits of environmental regulations, and therefore these benefits are typically underestimated or even dismissed. EO 562 places a mandatory duty on state agencies, stating that "each Agency ***shall*** sunset all its regulations on or before March 31, 2016" (emphasis added)[4] unless the regulation is "mandated by law or essential to the health, safety, environment or welfare of the Commonwealth's residents."[5] In order to find that a regulation meets this standard, the Agency must demonstrate, among other things, that: the costs of the regulation do not exceed the benefits that would result from the regulation; the regulation does not exceed federal requirements; and the regulation does not unduly and adversely affect Massachusetts citizens of the Commonwealth, or the competitive environment in Massachusetts.

These requirements are alarming. Regulations are adopted in order to control conduct, and as such, citizens and businesses being controlled can and do claim they are being adversely affected. In addition, federal requirements are often not stringent enough to protect the resources of the Commonwealth, and our laws and regulations were designed to specifically address those shortcomings. Although the Department of Environmental Protection (DEP) has issued a preliminary list of 18 regulations for amendment or rescission,[6] they state that 58 other regulations will be "further evaluated after March 2016."[7] In addition, it is unclear whether the Division of Fisheries and Wildlife is considering amending or rescinding any regulations. Our specific concerns about three sets of regulations that are at risk form this mandated review are outlined below.

The Wetlands Protection Act Regulations, 310 CMR 10.00

The Massachusetts Wetlands Protection Act (WPA), enacted in 1972, is implemented by the Commonwealth's 351 cities and towns. The DEP reviews and decides appeals of municipal decisions, enforces the WPA along with the cities and towns, and issues variances in cases where linear projects cross town boundaries, or where the

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[2] Id.

[3] Dechezleprêtre, A. and M. Sato, *The impacts of environmental regulations on competitiveness*, Grantham Research Inst. on Climate Change and the Environment and Global Green Growth Institute, Nov. 2014.

[4] EO 562, Section 2.

[5] Id.

[6] See "EO 562 Listening Sessions," at http://www.mass.gov/eea/docs/dep/service/eo562-listening-sessions.pdf

[7] Id.

Commissioner decides to "waive the application of one or more of the regulations on the basis of overriding public benefit."[8]

The federal Clean Water Act (CWA) is far less restrictive than the WPA. Specifically, the CWA only regulates discharges into wetlands or waters, while the WPA regulates alterations (including the cutting of vegetation) of wetlands, waters, and their upland buffer zones. Moreover, isolated vernal pools are protected in Massachusetts, and many are unprotected under the federal scheme.

Wetlands are critical for flood control, water purification, groundwater recharge, wildlife habitat, and recreation. If EO 562 were implemented as written, the WPA regulations found at 310 CMR 10.00 would automatically fail the test due to the fact that they are more stringent than federal regulations. Although it is difficult to assess the specific monetary benefits of wetland protection, scientists know that the functions wetlands perform can save us millions of dollars.[9] It would be short-sighted and risky to sunset these regulations.

Water Management Act regulations, 310 CMR 36.00
The Water Management Act (WMA) regulations govern the amount of water withdrawn from surface waters and groundwater sources. DEP's regulations purport to protect and balance the quantity of water for both human use and ecological needs. Unfortunately, in recent years, streams and rivers have been sucked dry by withdrawals for human use. This year, for example, the Ipswich River has been running at critically low levels since May, partially due to outdoor watering in communities.

Despite these low flows, it is worth noting that many citizens and some municipalities complain that the WMA places too much emphasis on ecological flow, and believes that the permitting scheme inhibits population growth. As such, some citizens of Massachusetts would say that the WMA regulations "unduly and adversely affect" them, rendering the WMA regulations subject to the sunset provision contained in EO 562.

Massachusetts Endangered Species Act Regulations, 321 CMR 10.00
The Massachusetts Endangered Species Act (MESA) regulations, overseen by the Division of Fisheries and Wildlife (DFW), protect the Commonwealth's endangered, threatened, and special concern species. States are typically at the forefront of protecting wildlife within their borders; their work in protecting endangered species not only complements the work done at the federal level, but prevents more species from joining the growing ranks of federally listed species. For example, the upland sandpiper (*Bartramia longicauda*) is endangered in Massachusetts and many other states, but falls slightly short of the requirements to be federally protected. If the upland sandpiper were no longer protected in Massachusetts and other states, populations would decline to the point where it would undoubtedly require federal protection.

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[8] 310 CMR 10.05(10)
[9] See e.g., http://water.epa.gov/type/wetlands/outreach/upload/EconomicBenefits.pdf

The species that are rare in Massachusetts are not always rare at the national level, and therefore there is only partial overlap between MESA and the federal Endangered Species Act. The numbers for vertebrates are below.

Number of species	**Listed in Massachusetts**	**Listed federally**
Fish	10	2
Amphibians	4	0
Reptiles	15	7
Birds	29	2
Mammals	14	7
TOTAL	**72**	**18**

Again, it is unclear whether DFW is considering changes to MESA pursuant to EO 562. However, if EO 562 is implemented as written, 54 vertebrate species currently listed under MESA would no longer be afforded any protection.

Conclusion

These three examples sets of regulations demonstrate how sweeping EO 562 could be if implemented as written. PEER urges the Commonwealth to restrict its rescissions and amendments to the 28 regulations outlined in DEP's preliminary proposal.

Sincerely,

Kyla Bennett, Director
New England PEER