



**Charles River Watershed Association**

December 5, 2011

Via e-mail:

[MassDEP.Commissioner@state.ma.us](mailto:MassDEP.Commissioner@state.ma.us)

Draft Regulatory Reform Action Plan c/o  
Jakarta Childers, Commissioner's Office  
Massachusetts DEP  
One Winter Street, 2<sup>nd</sup> Floor  
Boston, MA 02108

**Re: Draft Action Plan for MassDEP Regulatory Reform**

Dear Ms. Childers:

We strongly support the Commissioner's asserted "guiding principles" that the proposed reforms not weaken or undermine environmental protection standards, not reduce public process, and maintain opportunities for public involvement and citizen appeals. These principles are essential as DEP works to close the gap between its funded capacity and its ability to effectively serve its critical functions with respect to protecting the environment of the Commonwealth.

The importance of easily accessible filings, permits and data, and improved transparency in MassDEP decision-making are critical to regulatory reform efforts. As you recognize, this is only possible with new computer technology infrastructure and citizen access to near- and real-time information. We fully support the inclusion of new IT infrastructure in the FY 2013 capital budget and will support future funding for this in any way we can. We firmly believe that technology upgrades will more than pay for themselves in terms of freeing up staff resources to focus on actual problems and in achieving environmental protection. We are concerned, however, about the misalignment of the timetables for implementing the proposed regulatory measures and the IT upgrade since there will be a hiatus during this several-year gap when the public will not have easy access to information. It is important to consider how MassDEP will increase public access to information through the web during this time and whether some regulatory changes should be phased in to keep abreast of IT improvements.

As MassDEP recognizes, robust, and therefore, increased, enforcement and auditing are absolutely necessary with decreased MassDEP oversight. And also because public confidence in MassDEP decisions is mission critical, we ask that you commit to year-end analyses and reporting on enforcement and auditing of adopted changes. Necessarily,

Conservation Law Foundation, 62 Summer Street, Boston, MA 02110  
Phone: 617-350-0990 • Fax: 617-350-4030 • [www.clf.org](http://www.clf.org)

Charles River Watershed Association, 190 Park Road, Weston, MA 02493  
T: (781) 788-0007, F: (781) 788-0057, [www.charlesriver.org](http://www.charlesriver.org)

**Conservation Law Foundation**  
**CHARLES RIVER WATERSHED ASSOCIATION**

this evaluation should be comprehensive and answer the question whether certain changes have weakened environmental protection and therefore require tweaking or wholesale scrapping. The agency should remain flexible in its approach, willing to pull back reforms that are not working; because changes should not unintentionally hamstring MassDEP's authority, it should explicitly maintain its discretion to require individual permits or to modify permit conditions that are failing to protect.

In general, we are deeply concerned about measures that would diminish environmental protection standards, outsource core DEP functions, hinder enforcement efforts, or curb critically important public processes. These are discussed specifically below.

**Wetlands, Waterways & Coastal Resources:**

**Chapter 91:**

- DEP proposes to develop a common permit application for Chapter 91 licenses and Water Quality Certifications (WQC), and to streamline permitting requirements where there is perceived overlap— e.g., by allowing a 401 WQC permit-by-rule for applicants that secure other approvals. While we generally support common permit applications, we strongly oppose a transition to permits-by-rule for Section 401 WQCs for applicants that secure Chapter 91 permits and Orders of Conditions/Superseding Orders of Conditions.

Section 401 WQCs serve different purposes and entail examination of different issues than Chapter 91 and OOCs/SOCs: they simply don't match up with the analyses required for a WQC. Proper reviews and determinations for Section 401 WQCs are necessary for ensuring that state water quality standards are met, and neither Conservation Commissions, nor DEP SOC reviewers or Chapter 91 program staff, have the technical expertise to make Section 401 WQC determinations. Designated and existing uses and anti-degradation, mandated under the water quality standards, are not considerations under the Wetlands Protection Act or chapter 91. A rationale of already "adequately regulated" does not support this change, and it is disingenuous to suggest that local commissions and other programs will step in and fill this void. Because of the lack of alignment in the subject matter of these different reviews and the criteria to be applied, , , this change will result in less environmental protection. Such permits-by-rule would essentially abdicate the state's WQC authority, violate the purposes, if not the letter, of the federal Clean Water Act (Act), and be a lost opportunity to ensure that projects are meeting state requirements. [#1, p.3] It may be acceptable for these different processes to be conducted based upon a common set of forms – so long as the forms require the information needed for each of the determinations.

- DEP proposes to change its regulations to allow the Chapter 91 licensing process to run concurrently with MEPA review. An obvious problem with this is that projects are frequently not far enough along at the MEPA stage to enable meaningful public review and comment in the Chapter 91 licensing process on whether the public benefit is adequate to compensate for the public detriment from the loss of public trust rights.

**Conservation Law Foundation**  
**CHARLES RIVER WATERSHED ASSOCIATION**

While this proposal might compress the timeline for licensing, it will not result in DEP staff savings. If this proposal is adopted, DEP should require applicants to plainly disclose, at the outset and in detail, the “direct public benefits” of the proposed project consistent with 310 CMR §§ 9.31-9.39 and §§ 9.51-9.54. Applicants also should be required, in the same manner, to describe public detriments of the project, inclusive of private benefits, so as to allow the public and decision-makers to assess whether the public benefits exceed public detriments, as required. Further, any significant changes made during the post-comment period that would affect the project’s public benefits or detriments should be subject to new disclosure and a re-opened opportunity for public comment.

Additionally, a number of projects enter MEPA because of the state action under the Wetlands Protection Act. Allowing a Chapter 91 license to be issued before a final Wetlands OOC is obtained will in many cases eliminate public review in MEPA unless the project itself trips a Chapter 91 MEPA review threshold, and we oppose this because it reduces public participation.<sup>1</sup> [#2, p.3-4].

- DEP adoption of a generic “guide” for non-water dependent uses: as the Action Plan points out, license terms are currently individually negotiated and, we feel quite strongly, should continue to be. This is because public benefits and access are highly site-specific. While a high set of expectations and standards for public benefit, prescribed as the floor, will assist Chapter 91 staff in negotiations, this should be the starting point of public benefit discussions, not the end. [#3, p.4]

We continue to question how the public interest in tidelands can be preserved if general licenses are issued for small docks and piers. At a minimum, aggregations of small docks and piers that are subject to any general license must go through MEPA review if any review threshold is triggered by the aggregate impacts, and DEP must ensure that all public rights and interests under Chapter 91 are fully protected, including through enforcement of public access rights. A recent study by Charles River Watershed interns found that the majority of residential docks surveyed did not appear to have Chapter 91 licenses. Appropriate signage informing the public of access rights, a Chapter 91 requirement, was almost non-existent. [#4, p. 4]

If DEP establishes policies for Chapter 91 license terms, including a general license for small docks and piers, DEP should ensure that robust compliance and enforcement mechanisms are financed by the licensees. To this end, we recommend that additional license fees be charged annually to support investigation and reporting of license violations. Of course, licenses must ensure public access and direct public benefits. [# 3-4, pp. 4]

**Wetlands:**

- Assigning WPA File Numbers immediately upon submittal of a Notice of Intent (NOI) may make sense, but a size or resource impact threshold should be set for

---

<sup>1</sup> Obtaining Chapter 91 filings is cumbersome for the public under the current process and puts an unnecessary burden on Chapter 91 staff. We propose that applicants be required to provide a full filing upon request and that contact information for requesting the application be included in the Environmental Monitor.

**Conservation Law Foundation**  
**CHARLES RIVER WATERSHED ASSOCIATION**

limiting of DEP's review at the initial stage. On certain large or complex projects, this early review has proven helpful. [#5, p. 4]

- It is not clear what is intended by the proposal to reserve DEP intervention or participation to cases where there are “particularly sensitive resources” at issue. DEP should define the criteria it would apply for determining whether this threshold is met. [# 5, pp. 4-5]
  
- We are very concerned about the proposal to limit DEP review of projects in the outer fifty feet of the buffer zone. The ecological importance of maintaining significant buffer zones is beyond dispute, and buffers should be larger to be truly protective. In addition, it is not clear what activities would be subject to a general permit or similar regulatory provision if proposed for the outer fifty feet of the buffer zone. The type of activity allowed can have a significant bearing on the degree of impact. We agree with and join in MACC's thoughtful buffer zone comments in its November 29, 2011 letter. [# 6, p. 5]
  
- The proposal to exempt wetland “resources areas” created by stormwater management structures constructed prior to 1996, if they meet DEP performance standards, makes sense so long as operations and maintenance records can be produced and an inspection report demonstrates that the systems are functioning as designed. [#7, p. 5]
  
- We fully support the proposal to expedite and streamline permitting for ecological restoration projects, such as dam removals, where environmental benefits are expected to significantly outweigh impacts and affirmatively enhance the environment. Because persons may differ on what constitutes “ecological restoration” we support the working group approach to regulatory changes. [#8, p. 5]
  
- Although we are strongly in favor of responsible renewable energy development and support pending wind energy siting reform legislation that would consolidate and expedite permitting for eligible wind projects, we are concerned about the proposal to give “Limited Project” status to all projects eligible for “Renewable Energy Credits.” Although the regulatory reform proposal suggests that such changes would be applied primarily to wind and solar projects, the Massachusetts Renewable Energy Portfolio Standard provides REC eligibility for a broad range of projects that may have a broad range of impacts on important resource areas. The rules should not be revised in a manner that would reduce or discourage the avoidance, minimization and mitigation of impacts to wetland resources. [#9, pp. 5-6]
  
- Although we support efforts to improve regulatory/permitting clarity for new energy technologies, the proposal to change coastal permitting programs for “limited pilot projects” is so vague that it is nearly impossible to provide meaningful feedback. What project types, scales or durations would qualify as a “limited pilot project”? What regulations would be modified, and in what respects? All energy projects have impacts, and we do not believe that monitoring and reporting safeguards are sufficient to prevent damage to the environment without meaningful up-front efforts

to evaluate and to avoid, minimize and mitigate impacts. [#10, p. 6]

**B. Wastewater:**

• We – like many other stakeholders, such as the Neponset River Watershed Association – are very concerned with DEP’s proposal to eliminate sewer extension and connection permits. Under DEP’s proposal, permitting for all sanitary and industrial sewer connections and extensions would be eliminated. It is important for DEP to retain its authority to require individual permits, appeal rights and MEPA review. This proposal runs counter to the Action Plan’s principles because it would cause a truly significant reduction in environmental protection standards while at the same time eliminating opportunities for public input and comment.

Most sewage treatment plants (other than MWRA) do not have the capability of identifying or treating more than a handful of toxic pollutants in sewer discharges. Such pollutants are most likely to be contained in wastewater from heavy industry, chemical laboratories, hospitals, and certain commercial operations.

Before DEP even considers elimination of state permitting for industrial and commercial sewer discharges, it should first fully enforce the industrial toxic reporting provisions of the regulations that it adopted in 2006 but never implemented. Those regulations were designed to identify and to reduce toxics in wastewater before they are discharged into waters of the Commonwealth.

Because nearly all local sewer permits are issued by municipal sewer authorities and not by (often regional) publicly owned treatment works (POTWs), municipalities have little incentive to deny sewer permits for large new development projects that may overwhelm the POTW’s treatment capacity. Consequently, state oversight permitting is especially important for large projects and projects where: (1) the POTW is close to capacity, (2) the POTW regularly discharges a pollutant at or near its permitted limit into a water which is impaired for that pollutant (i.e. phosphorus or nitrogen), or (3) the POTW is a significant contributor to nutrient impairment at a local or regional scale . [#11, pp. 6-7]

• With respect to DEP’s proposal to outsource review of “innovative and alternative” Title 5 wastewater treatment technologies, it would be essential for the concomitant DEP auditing mechanism(s) to be robust. Generally, the function of providing “unbiased science” is designated to regulatory agencies because of their unique status as independent from commercial interests. In order to assure that outside review, ranking, or proposed approval of wastewater treatment technologies is legitimate, , DEP must make sure reviewers have no financial or commercial stake in the outcome of the review and no other conflicts of interest . DEP would still need to set standards and exercise more than “some” level of oversight over the technology review. DEP’s continued role in assuring objective and reliable information about performance of these technologies is critical given that septic systems contribute significantly at a localized or regional scale to nutrient impairments of Massachusetts waterways, and that decisions guiding nutrient

**Conservation Law Foundation**  
**CHARLES RIVER WATERSHED ASSOCIATION**

pollution reduction on Cape Cod and elsewhere in the Commonwealth would be served by truly independent performance appraisals of these technologies. = [#12, p. 7]

- Regarding DEP’s proposal to eliminate “duplicative” state approvals for Title 5 septic systems and “shared system” approvals, we are concerned that the supposed safeguard proposed by DEP – i.e., the *possibility* of intervention in local permitting processes – provides little assurance that problems will be avoided on a systematic basis. In addition, given significant nutrient-loading problems in the Commonwealth, we question the wisdom of reducing oversight of systems such that existing problems risk being exacerbated. [#13, pp. 7-8]

- With respect to DEP’s proposal to cease routine annual inspections of groundwater discharge facilities and instead rely on a combination of (a) focusing on compliance data and (b) establishing a requirement for groundwater dischargers to hire private qualified professionals to conduct periodic compliance assessments, we are concerned that this proposal will entail significant up-front investment by DEP for training the third party inspectors and may reduce the reliability of inspections and enforcement. Should this proposal nonetheless be adopted, dischargers should be required to pay into a fund to support independent third-party inspectors randomly assigned by DEP, rather than hired directly by dischargers, to ensure an arms-length relationship and the integrity of inspections. Robust audits are also important for ensuring ongoing quality of third party inspections, particularly as the program begins. [#14, p. 8] DEP need look no further than its “Performance Track” program for confirmation that audits based on self-disclosure must be coupled with enforcement, in order to be effective. Groundwater is a valuable and precious resource on which our economy and population rely, and any investment in meaningful inspection and oversight of groundwater discharge permits will serve the Commonwealth’s economy and residents into the future.

**C. Solid Waste:**

- DEP’s proposal to reduce its management and oversight of solid waste facilities by adopting measures including permits-by-rule for certain post-closure activities and for small transfer stations, as well as self-certification for permit renewals, raises significant concerns regarding erosion of protections for the environmental and public health risks posed by solid waste facilities – risks disproportionately faced by environmental justice communities. We are strongly opposed to permits-by-rule for the siting of small transfer stations, and have serious concerns about the proposal to privatize active landfill inspections. Regarding self-certification for permit renewals, this would require a robust level of auditing by DEP to detect and to deter violations, ensure compliance and to promote public confidence. Self-certification for permit renewals certainly should not be available for any facility where there has been a past violation. There will be significant start-up costs for training and certification of third-party inspectors, but the independence and selection of inspectors DEP is proposing (and which should be adopted for groundwater discharge inspectors (#14), is important. We wonder if raising the fees and having the agency perform the

work itself might make more sense. [#15-16, pp. 8-9]

**D. Waste Site Cleanup:**

- DEP has a number of requirements for filing Activity and Use Limitations (AULs) with Registries of Deeds, often requiring multiple trips to the relevant Registries. We support efforts to refine the requirements to reduce complications without sacrificing the public sharing of important information. Increased public accessibility of on-line information regarding AULs would benefit DEP and the public alike. [# 17, p. 9]
- DEP’s proposal to eliminate Tier I Permits unfortunately would eliminate the option of writing special requirements into the permits. If permits were eliminated, the MCP would need to be amended to provide alternative enforcement mechanisms. [#18, p. 9]

**E. Other Areas:**

- Given the inherent risks associated with moving from agency oversight to self-certification, we are very concerned with, and oppose, the broad, vague proposal to streamline “certain” permit renewals by providing for presumptive approval based on self-certification of compliance with regulatory standards. Permit renewal is a core DEP function which should not be abdicated—indeed even the renewal process itself provides safeguards that bolster compliance.

Permit renewals generally provide key opportunities to re-evaluate projects and facilities based on evolving impacts, including shifting cumulative impacts, to air, water and other natural resources and enables DEP to implement evolving policy and program strategies. Without meaningful agency review at the time of permit renewal, opportunities for such critical re-evaluation – and for consequent modifications to renewed permits – will be lost.

We are concerned that presumptive approvals are likely to eliminate appeal rights, and will definitely eliminate meaningful public review and input. While we strongly oppose this, if DEP goes ahead, presumptive approvals should be the rare exception, rather than the rule, and DEP should pilot this for one type of permit in a particular media and fully evaluate the results before expanding it to any other permitting system. Clearly an actual application with update information should be required, and submissions should be under the pains and penalties of perjury. DEP should explicitly reserve its discretion to require that permittees go through a full permit renewal process, whether because of size, impacts or community concern. [#19, p. 10]

- We strongly support efforts to significantly expand or require e-filing of applications, given that this can reduce burdens on DEP and applicants alike while promoting easier public access through DEP’s website. We also support fee-based incentives for projects that are expected to substantially out-perform basic compliance with environmental protection standards and requirements. We believe that such

**Conservation Law Foundation**  
**CHARLES RIVER WATERSHED ASSOCIATION**

performance-based fee incentives might work, for example, in the wetlands context. [#20, p. 10]

- In connection with the proposal to reduce the extent of asbestos abatement management and oversight, it is important to keep in mind that violations are notorious in asbestos abatement and disposal and directly threaten the health of workers employed by these companies. It is also particularly important to protect against disproportionate impacts to environmental justice communities. It is not clear how DEP will determine the “highest priority asbestos matters.” Notably, many of the criminal cases brought by the Environmental Strike Force involve asbestos violations. [#21, pp. 10-11]

**Additional Reforms Not Included in DEP’s Package of Proposals:**

- We strongly encourage DEP to promulgate regulations to clarify the process for air permitting appeals. DEP has long had such rules in the wetlands, waterways and solid waste contexts, but there is a lack of similar regulatory guidance/structure in the air permitting area.
- While not now being proposed, but because there was discussion during the stakeholder meetings about DEP assuming primacy for the NPDES program from U.S. EPA, we would like to express our strong opposition to this. It would be tremendously costly both at start up and long-term and require legislative changes – running counter to two of the basic tenets MassDEP established at the outset of its regulatory reform initiative. Co-sharing responsibility with U.S. EPA generally has resulted in strong environmental protection and Section 401 authority is a powerful tool that the state already has on hand to protect the citizens of Massachusetts and our water resources.

Thank you for this opportunity to submit comments regarding the Draft Action Plan for MassDEP Regulatory Reform.

Sincerely,



Susan M. Reid  
Director, CLF Massachusetts  
Conservation Law Foundation  
sreid@clf.org



Margaret Van Deusen  
Deputy Director/General Counsel  
Charles River Watershed Association  
mvandeusen@crwa.org