



SENT VIA E-MAIL ([Elizabeth.Mccann@state.ma.us](mailto:Elizabeth.Mccann@state.ma.us))

January 17, 2005

Elizabeth McCann  
DEP Commissioner's Office  
One Winter St., 2nd floor  
Boston, MA 02108

Dear Ms. McCann:

Thank you for the opportunity to comment on the U.S. Environmental Protection Agency (EPA) Region 1 draft final combined Performance Partnership Agreement /Program Plan (PPA) with Massachusetts Department of Environmental Protection (MADEP) for 2005 through 2006. 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 has been commenting on the PPAs for several years now, and we remain concerned that for many programs in Massachusetts, the PPA is merely a rubber stamp on ineffective programs which are undertaken with virtually no oversight or accountability. In particular, we would like to remind you that the Inspection and Maintenance Program (I/M Program) is still flawed; in fact, we have recently filed a whistleblower complaint against managers within the program in order to protect one of our clients involved in exposing the problems associated with the program. Moreover, PEER is troubled by DEP's failure to assess the quality of the Commonwealth's waterways, and that this failure threatens both the Massachusetts environment and the health of its citizens. Given that Massachusetts DEP receives over \$14.5 million dollars from EPA to carry out these programs (see page 83 of the PPA), PEER believes that we should be getting more bang for the buck.

### **Specific comments**

#### Resources

In the introduction of this year's PPA, DEP states that it is roughly 25% smaller than it was three years ago. To address this, DEP suggests that it will become more focused, and work on those items that are most important. While we understand that budget cuts are somewhat out of DEP's control, we also believe that these cuts are unconscionable. PEER does not believe that the Commonwealth can afford to focus only on a subset of the environmental problems we face merely because the Governor has chosen to cut the budget. It is incumbent on DEP managers, as well as NGOs such as PEER and the citizens of Massachusetts, to demonstrate to this administration why the budget must be increased.

An example of how these resource reductions harm oversight of DEP's programs can be seen under the discussion of federal reporting requirements. On page 66 of the PPA, DEP discusses how the federal reporting requirements under the array of environmental statutes are burdensome. Rather than view these reporting requirements as legally mandated and necessary oversight, DEP states that it – and other states – are engaged in discussions with EPA to reduce these burdens. Rather than address the various reporting requirements, DEP states, and EPA apparently agrees, that it will merely focus on those reporting requirements that it believes are “high-priority reporting requirements that are particularly important to DEP's mission and are of particular value to the regulated communities.” DEP then states that as it “continues to work with severely constrained resources and with significantly reduced staffing levels (25% over the past 2 years),” it will likely not be able to meet its reporting requirements. One of the reporting requirements that DEP has failed to meet in the past is the annual reports to EPA regarding the vehicle emissions programs. Had DEP been able to prepare these reports and submit them to EPA, the problems associated with the much-maligned program would have been discovered years earlier. The end result is that air quality in the Commonwealth continues to be threatened, and citizens of Massachusetts continue to pay for a flawed emissions test. The I/M debacle demonstrates why compliance

with these reporting requirements is important. Therefore, we do not believe that DEP should comply only with those reporting requirements it feels are important to its mission.

### I/M Program

While the portion of the PPA dealing with the Inspections/Maintenance Program goes to some length describing equipment audits and “covert visual audits,” there is no attention given to the underlying flawed test (see page 13 of the PPA). While the PPA does state that DEP will “[i]mprove inspection and maintenance testing equipment and software,” it does not specify whether these improvements will include administering an emissions test that has been proven comparable to the IM240 test. Moreover, it states that the DEP will “[p]repare and submit annual report to EPA mandated by federal I&M regulations.” PEER understands that DEP still has yet to submit its federally mandated reports for the years 2000 and 2001. Given this, it is puzzling how EPA merely states that its duties under the I/M program are to “continue to work with the DEP assist (sic) with implementation of the I/M program.” At the very least, PEER would hope that EPA would demand the immediate production of all reports, and ensure that the current emissions test is indeed comparable to the IM240 test.

### Clean Water

The Environmental Progress Report, incorporated by reference into the PPA and found at <http://mass.gov/dep/brp/epp/epphome.htm>, discusses DEP’s assessment of the Commonwealth’s waters.<sup>1</sup> Specifically, DEP states

Only a small percentage of Massachusetts’ waters are known to meet water quality standards. The majority of our rivers and marine areas have not been sampled to see what pollution might be present. For example, we have only monitored 22% of the river miles in the state; 60% of the miles sampled have one or more water quality problems, 40% of the assessed miles meet water quality standards. This translates into only 9% of the total river miles known to meet water quality standards (78% not assessed, 14% not meeting water quality standards).”

Again, as in past years, the failure of DEP to even assess these waters is immensely troubling.

Finally, DEP states that “Although we hope that we have identified the most severe problems, such a limited monitoring program cannot determine the full extent of our pollution issues nor can it identify the subbasins where problems are most acute.” PEER believes that DEP must make these assessments a priority.

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<sup>1</sup> PEER commends DEP for placing these data on the web for public consumption. While the data contained on this site is certainly troubling, the fact that DEP is willing to make this information more widely available is certainly a step in the right direction. Until now, only the few who actually read the PPA had access to these data; we welcome this new transparency.

## Wetlands

The PPA states that there have been:

extensive illegal alternations of wetlands that has occurred despite a substantial proportion of staff resources concentrated on the oversight and review of local conservation commissions' orders. While such permit-oriented compliance activities have an important role in protecting wetlands, that protection is limited to property owners that obtain valid orders and comply with them. As the reconnaissance demonstrated, it does not addresses (sic) the more pervasive illegal alternations conducted outside the system or the beyond approved limits established by the wetlands regulations or orders of conditions. Using advanced technology combined with aerial and field surveillance, DEP intends to intensively redirect resources into a compliance strategy and enforcement response that compels the remediation of past illegal alterations, collects the economic benefit obtained by illegal filling, communicates that non-compliance will be uncovered, and clarifies which elements of the local permitting process need to strengthened to prevent further uncontrolled wetland loss (see page 78).

PEER disagrees with this approach. While we concur that illegal wetland filling must be addressed, we do not believe it should be at the expense of a strong permitting program. When permits are issued to fill wetlands - even small areas - the indirect and secondary impacts (e.g., water quality degradation, habitat fragmentation, changes in hydrology, etc.) can be much larger than the immediate footprint of fill. Moreover, over the past few years, science has overwhelmingly indicated that without an upland buffer, many wetlands will be impaired, or even valueless for some functions. DEP's wetlands protection program was noteworthy because it considered the 100-foot buffer zone around most wetlands a resource area to be protected. DEP is now attempting to apply a "buffer zone simplified review" which minimizes protection of these crucial buffer zones (see page 71). We contend, therefore, that the wetland losses associated with permitting are collectively far greater than those associated with illegal filling. If DEP's sole reason for applying a "buffer zone simplified review" is to save limited resources, we urge you to consider a no-build buffer zone around all wetlands. This would result in increased wetlands protection, and less staff time devoted to buffer zone reviews.

Finally, PEER is concerned that even with this re-focusing effort to alleviate resource constraints, DEP states that enforcement outputs are "likely to be reduced" (p. 77). We would urge DEP to seek additional funding from the Romney Administration in order to administer effective enforcement programs across the board.

## License Site Professional (LSP) Enforcement

The PPA states that when DEP is reviewing "response action submittals or information about releases, DEP will routinely consider whether an License Site Professional (LSP) of Record should be cited for noncompliance with the MCP" (page 61). In the past,

PEER has expressed concern about the use of LSPs in enforcement cases. The fact that DEP is now discussing enforcement against LSPs in its PPA indicates that there is indeed a problem with allowing environmental violators to hire consultants to clean up and then approve their own clean up of contaminated sites. Rather than spend the resources taking additional enforcement actions against a violator's consultant, PEER urges DEP to have its own inspectors assess clean up activities. We understand that additional resources would be needed, but given how the "fox watching the chicken coop" idea is not working, we think it merits some additional thought.

### **Conclusion**

PEER is extremely concerned about the reduction in resources within DEP, especially in light of the important assessment, enforcement, and permitting work that remains to be done. Moreover, we believe that EPA must take a more active role in ensuring that DEP complies with *all* of its obligations under federal law, and to hold DEP accountable for its work on these programs. Finally, we realize that our comments on the PPA over the past three years have become increasingly repetitive. EPA is sending a clear message that the millions of dollars it gives to Massachusetts each year is not contingent on the work actually done on the ground. Perhaps DEP should re-direct the resources it takes to draft and develop the PPA to doing some tangible environmental work.

Please feel free to contact me if you have any questions.

Sincerely,

[Kyla Bennett](#)

Kyla Bennett, Director  
New England PEER  
P.O. Box 574  
North Easton, MA 02356  
(508)230-9933  
[nepeer@peer.org](mailto:nepeer@peer.org)