



## **New England Public Employees for Environmental Responsibility (PEER)**

### **Testimony of Kyla Bennett New Proposed Regulations, 310 CMR 10.00 Massachusetts Wetland Protection Regulations and Amendments to 310 CMR 1.00, MA DEP Adjudicatory Hearing Regulations**

**August 13, 2007**

I am the Director of New England Public Employees for Environmental Responsibility (PEER). 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 municipal, state and federal government employees nationwide; our New England chapter is located outside of Boston, Massachusetts.

PEER objects to three major provisions of the proposed amendments: eliminating 10-citizen adjudicatory appeals; mandating the issuance of the Final Appeal to seven months in “complex” cases and other tight timeframes; and inserting a Presiding Officer at DEP to hold evidentiary hearings instead of allowing the Division of Administrative Law Appeals (DALA) to hear all the cases. Our specific comments are set forth below.

**Elimination of 10-citizen adjudicatory appeals.** Massachusetts Department of Environmental Protection (DEP) claims that the proposed regulatory changes would result in “timely and fair adjudicatory hearings in wetland appeals” by avoiding “unnecessary delay in the wetland appeal process.” To support its contention, DEP claims that under the current regulatory appeals system, some appeals “take more than a year to resolve.” To make these adjudicatory appeals more efficient, DEP proposes to limit the parties who may initiate an appeal to: an applicant who filed a Notice of Intent, an aggrieved person, or a Conservation Commission. Therefore, groups of ten citizens would no longer be allowed to appeal these cases. DEP’s reasoning behind this limitation is to remove “persons or entities with *no legal standing* to request an adjudicatory hearing” (emphasis added).

I never thought I would find myself lecturing the DEP on why wetlands are critical to the citizens of the Commonwealth, but statements such as this indicate that it may indeed be necessary. Wetlands purify our drinking water. They prevent flooding. They recharge our drinking water. They provide habitat for countless rare and endangered wildlife, and common fish and wildlife critical to the Commonwealth’s economy. Because wetland functions help every Commonwealth citizen, their preservation is of interest to the general public. In fact, DEP’s own website states:

The Wetlands Protection Act protects wetlands and the public interests they serve, including flood control, prevention of pollution and storm damage, and protection of public and private water supplies, groundwater supply, fisheries, land containing shellfish, and wildlife habitat. These public interests are protected by requiring a careful review of proposed work that may alter wetlands (See <http://www.mass.gov/dep/water/resources/protwet.htm>).

Given that wetland protection is a “public interest,” it seems logical that the public should therefore have standing to protect these interests. To blithely state that DEP is not going to allow a group of ten citizens to appeal a wetland decision because they have “no legal standing” is contrary to reality.

DEP proposes to restrict such adjudicatory appeals to aggrieved persons. An aggrieved person is defined as:

any person who, because of an act or failure to act by the issuing authority, may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in M.G.L. c. 131, § 40. Such person must specify in writing sufficient facts to allow the Department to determine whether or not the person is in fact aggrieved. 310 CMR 10.04.

Unfortunately, it is often difficult – if not impossible – to demonstrate harm before the action causing such harm is taken. Moreover, given the complex hydrology of many wetlands and the varying underlying substrates throughout the Commonwealth, biologists and hydrogeologists are often unable to predict the effects of a particular action such as filling wetlands, blasting, or discharging wastewater in a particular location. In most cases, therefore, no one knows who will truly be harmed by a permit until after the permit is issued and the work is completed. The legal hurdle of proving that you “may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public” is therefore quite high, and likely eliminates many people who would, in fact, be harmed by issuance of a wetland permit. The current system allows any 10 citizens to bring an adjudicatory appeal, thus allowing appeals by citizens who may indeed be harmed, but cannot – due to circumstances beyond their control – meet the tough legal standard of an aggrieved person. This right should be preserved.

Finally, it is not clear that these 10-citizen adjudicatory appeals are the cause of the delays experienced in wetlands cases. In fact, DEP’s statistics indicate that they are not. In 2004, there were 33 such 10-citizen appeals; in 2005, there were 15; and in 2006, there were only four. In order to truly determine what is causing the delays in issuing wetlands permits, DEP should have done a comprehensive analysis of the appeal data over the past five to ten years. To my knowledge, such analysis has not been done. In fact, DEP recently issued a regulatory “fix” that did nothing to actually address the problem. In 2005, DEP issued regulations that simplified

the review process for applications to disturb buffer zones. The regulations were issued in order to make the permit review process more efficient by reducing time spent reviewing permits. The environmental community warned DEP that this simplified review would not make the wetland permitting process more efficient, but the regulations were issued over their protestations. In the Preamble to the 2005 regulations, DEP stated:

The final regulations reflect the many comments on the proposed regulations from conservation commissions, developers, environmental advocates, and other interested persons. The Department benefited greatly from this public participation and is committed to evaluation of the simplified review process to ensure that it is effective as an incentive for increased protection of wetlands in exchange for reducing permitting process. While acknowledging the skepticism of many commenters about the reliability of such a system for wetlands protection, the Department has committed to evaluating the program and will continue it only if it is successful. See <http://mass.gov/dep/service/regulations/310cmr10a.pdf>.

As of August 3, 2007, DEP informed me that only “12 or 13” of these simplified reviews had been submitted since 2005, and that “no analysis of the Simplified Review regulations has occurred at the present time” (personal communication with Lealdon Langley, DEP, via e-mail). Moreover, DEP also stated that the regulatory changes “were not as effective” as DEP had hoped, and were not a “big time saver” (personal communication with Michael Stroman, DEP, July 27, 2007). In order to prevent the issuance of regulations that fail to accomplish the stated goal, and may in fact be detrimental to wetland protection, I believe that DEP must first do a comprehensive analysis of the data in order to determine precisely what the problem is and how it might be solved.

For these reasons, I urge DEP to preserve the ability of 10 citizens to bring adjudicatory appeals.

## **DEP should have all adjudicatory appeals go to DALA, not a Presiding Officer**

**within DEP.** The proposed regulations also shift the evidentiary hearing and decision as to who will hear an appeal to a Presiding Officer within DEP. It is abundantly clear that DEP is furtively taking review power away from the Administrative Magistrates in the Division of Administrative Law Appeals (DALA) and giving it to DEP, the very agency whose decision is being questioned. In 2004, the previous Administration inserted a “pre-screener” in DEP to “ensure timely, fair, and efficient adjudicatory proceedings” (see January 20, 2004 Commissioner’s Directive issued by Jonathan C. Kaledin, General Counsel). Also in 2004, the Romney Administration tried to fire the Administrative Law Judges (ALJs) who had been hearing appeals for DEP as the Commissioner’s Presiding Officers. The ALJs went to court, and succeeding in being moved from the Office of Administrative Appeals within the Executive Office of Environmental Affairs to DALA. The ALJs then became Administrative Magistrates at DALA.

Another blow came in March of 2005, when DEP limited adjudicatory appeals to those who had “prior participation” in the Conservation Commission process. “Prior participation” was defined as “submitting written information to the conservation commission, requesting the superseding order, or providing written information to the Department.” Given that citizens attending Conservation Commission meetings rarely submit written testimony, this severely restricted citizen appeal rights.

Currently, if an appeal makes it through DEP’s pre-screener, the case will go to DALA. DALA is an independent agency created in 1974 to replace in-house hearing officers and conduct adjudicatory hearings. DALA’s website states:

The concept of an independent hearing agency, or corps, of Administrative Magistrates differs from traditional notions of administrative law. Traditionally, hearing officers were

employed by the agencies they served. These agencies have typically been charged with investigating, prosecuting and adjudicating cases involving the citizens they regulate. The main reason for establishing a separate hearing agency is to give Administrative Magistrates independence from the agencies they serve.

The strength of the hearing agency system is the guarantee that the fact finder is impartial. A person contesting the decision of an agency has the legal right to a fair and speedy determination of his or her claim by an impartial fact finder. At DALA, the Administrative Magistrates are independent from the agency whose action is being tried. There is no question of bias on the part of the Magistrate and, perhaps even more importantly, there is no appearance of bias or unfairness in the hearing process. The concept of an independent hearing agency is gaining in popularity nationwide, and DALA is now one of 24 state and two city (New York and Chicago) independent hearing agencies (<http://www.mass.gov/dala/Whoarewe.htm>).

DALA hits the nail on the head – these appeals *must* remain impartial. By placing the power in the hands of a Presiding Officer who works with and reports to the people who made the decision being appealed, DEP is giving the appearance of bias.

Under the current proposal, the Presiding Officer will conduct an evidentiary hearing and “retain the option of transferring cases to Division of Administrative Law Appeals (DALA) on a case-by-case basis where she determines that the timely resolution of a matter will benefit from DALA’s assistance.” The DEP Commissioner already retains power to overturn a DALA decision, and indeed, this happens more frequently than it should. Having relatively independent magistrates review DEP permit decisions adds an unbiased second look at such decisions. By shifting review of a DEP decision to another DEP employee, there are no checks and balances. In effect, you have the fox guarding the chicken coop.

In order to maintain the impartial review of these cases, they must be heard by magistrates at DALA. If there is a backlog at DALA, the solution is to hire more magistrates, not to eliminate appeal rights.

**Requirement that Final Decisions be issued within seven months for “complex cases” should be eliminated.** Over the past few years, DEP has issued numerous regulatory and policy changes in order to hasten wetland permitting decision. Each change promises to make the

process more efficient, yet every year, more changes are proposed. These changes have eroded citizen's rights and created an unlevel playing field. Governor Patrick and Secretary Ian Bowles want DEP permitting to be at the "speed of business" (see <http://www.mass.gov/dep/public/publications/0407pstr.htm>). Indeed, no one can argue against quick and efficient permit decisions; however, we must first ensure that such speedy decisions are effectively protecting the environment.

The proposed regulations mandate a seven month timeline for "major or complex" appeals. This will not be enough time for some of these cases. Wetland cases, by their nature, involve field work. Seven months does not encompass an entire year, and there could be cases that require an analysis of a wetland or a rare species issue within a certain time frame. While DEP could certainly strive to have all appeals completed within this time frame, it is illogical to require such a timeframe for these complex and major cases.

**Conclusion.** Governor Patrick ran on a platform of "Together we can." He spoke eloquently of citizen participation, and working together to make the Commonwealth a better place. But at least in the environmental arena, "Together we can" has become "Alone I am." I understand and agree with the Governor's desire to be efficient. The proposed changes before us today are based on an assumption that citizens of this state have nothing meaningful to contribute to these wetlands appeal cases. On the contrary, Massachusetts citizens have everything to contribute. There have been many cases where citizens have been the ones to find an endangered species that an applicant's consultants failed to notice, or where citizens have found overlooked wetlands that would be impacted. Adjudicatory appeals are expensive, difficult, and time-consuming, and citizens do not enter into them lightly. If there is a problem with delays, and I concede that there is, it should be approached methodically and comprehensively. Taking away the appeal rights of citizens and creating a biased appeals system is not the answer.

Indeed, in the long run, it may result in even more delays through actions brought to the Massachusetts courts.

The answer is simple. Define the problem based on real data, examine the options you have to fix that problem with the tools available, and fix it. This can and must be done without reducing the rights of Massachusetts citizens to participate in the protection of our public resources.

Thank you for consideration.