August 14, 2003

Dave Shaw
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SENT VIA E-MAIL TO: DSHAW@MASSMAIL.STATE.MA.US

Dear Mr. Shaw:

Thank you for the opportunity to provide comments on the proposed lease extension at Massachusetts Military Reservation. Public Employees for Environmental Responsibility (PEER) is a national non-profit organization concerned with upholding environmental laws, and defending local, state and federal employees who protect the environment. PEER is extremely concerned about the proposed lease extension, which would give the military control of the land for 48 years. As stated in the Final Environmental Impact Report, the leases "do not give the Commonwealth the right to terminate or modify the leases." See, FEIR, p. 144. Therefore, a lease extension would be an irrevocable action. PEER believes that the current 23 year lease is sufficient to accomplish whatever the military needs to do, and strongly urges Governor Romney to forego signing of the proposed lease extension. Moreover, PEER believes that the lease cannot be signed until such time as an Environmental Impact Statement (EIS) is prepared pursuant to the National Environmental Policy Act (NEPA). Our specific concerns are set forth below:

BACKGROUND

The Department of the Army (Army) is proposing to extend a lease between the Army and the Commonwealth of Massachusetts for use of lands in Bourne and Sandwich at the Massachusetts Military Reservation for military uses. Currently, the lease signed by both parties in 1976 allows the Army to utilize the lands through September 30, 2026. The proposed lease extension would allow the Army to use these same lands through September 30, 2051.

The Army presents several reasons for pursuing the lease extension at this time. First, it states that a lease extension is required to allow critical capital projects to be constructed at the Otis Air National Guard base. According to a Department of Defense (DoD) policy, the DoD does not expend significant resources at bases unless it has at least 25-year control over that base. Second, it appears that the DoD has plans to construct a

proposed “northeast Regional Center for Homeland Security” at MMR. Again, in order to make the MMR a suitable site for such a massive undertaking, the DoD would like to have control over the base for a significant amount of time. Third, the Army implies that a lease extension is necessary to ensure the clean-up of the contaminated areas at and around MMR.

CONCERNS WITH PROPOSED LEASE EXTENSION

The DoD should prepare an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA). PEER believes that the Army must prepare an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA) for the proposed lease extension. In some cases, it would be rational to assume that the Army would qualify for a Categorical Exclusion (CX) under NEPA for a lease extension (see, e.g., AR 200-2, Appendix A). A "categorical exclusion” is defined by NEPA regulations as “a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations and for which, therefore, neither an environmental assessment nor an environmental impact statement is required …” See 40 CFR 1508.4. CXs are typically reserved for routine and repetitive federal actions, and were designed to reduce paperwork and save time and money when such routine actions occur. However, in the case of the Massachusetts Military Reservation, a categorical exclusion cannot apply for several reasons. AR 200-2, Section II, A-31 states that a CX cannot apply if, among other things, the action will affect a sole source aquifer, if there is a “potential of an already poor environment being further degraded,” or if there is an “environmentally controversial change to existing environmental conditions.”

In this case, the Massachusetts Military Reservation sits atop of a sole source aquifer which provides drinking water to the Upper Cape's year-round and seasonal residents. The largest part of the aquifer lies directly under the Camp Edwards training range, and is particularly susceptible to contamination given the shallow depth to groundwater and the sandy, porous soils. As you are well aware, contamination has been found both on the MMR and in the areas surrounding the Reservation. Most recently, in May of this year, perchlorate in concentrations higher than Massachusetts Department of Environmental Protection (MADEP) allowable limits were found in a resident’s well adjacent to the Reservation. Thus, the lease extension involves land sitting atop a crucial sole source aquifer for citizens of Cape Cod, and the potential certainly exists for an “already poor environment to be further degraded” from military activities associated with the lease extension. Finally, given the large number of opponents to the lease extension due to concerns about the environment, PEER believes that the proposed activities associated with the lease extension qualify as an “environmentally controversial” change.

The existing lease, subsequent amendments, and Memoranda of Agreement do include some requirements for the Army to mitigate environmental contamination at the base, but these requirements are vague. Moreover, it is disconcerting to PEER that the Army has refused to comply with the recent DEP Notice of Responsibility regarding the perchlorate contamination (see below), which leads us to believe that the Army will indeed allow the contamination to continue without mitigation. In other words, the lease extension, as written, will lead to an "already poor environment to be further degraded." PEER believes that until such time as the Army agrees to clean up the Commonwealth's land according to Commonwealth standards, no further lease extensions should be allowed. If the Commonwealth persists in pursuing this prolonged lease extension, at the very least it should ask that an EIS be prepared so that all the environmental issues and alternatives can be examined pursuant to NEPA.

A lease extension is not required to allow critical capital projects to be constructed at the Otis Air National Guard base. The DoD has an internal policy containing a requirement that in order to receive funding for facility development, their remaining lease term must be at least 25 years at the estimated completion date of the proposed project. In the case of MMR, the Army argues that the proposed new fire station and air control tower at Otis Air Base would not be funded unless the lease extends for at least 25 years. DoD's policy is not law, and it can be – and, according to the Massachusetts Attorney General's office, has been in the past – waived. The current lease has 23 years remaining. If DoD is able to persuade the Commonwealth that a minimum 25 year lease is necessary to construct the fire station and air control tower, the Commonwealth could (at a maximum) consider extending the current lease by three to five years. However, this policy is not a law by which the DoD must abide, and extending the existing 23 year lease by an additional 25 years is unnecessary and excessive.

The Army improperly implies that it is immune from suits by the Commonwealth of Massachusetts pursuant to the Massachusetts Contingency Plan (MCP). Amendments to the Massachusetts Oil and Hazardous Material Release Prevention and Response Act (the Massachusetts version of Superfund), M.G.L. Chapter 21E, were enacted in July of 1992. Subsequently, revisions to 21E regulations took effect in October of 1993. These revised regulations are known as the Massachusetts Contingency Plan, or MCP, and are codified as 310 CMR 40.0000.

On May 13, 2003, the MADEP issued a Notice of Responsibility to the Department of Army due to the discovery of 1.75 micrograms per liter of perchlorate in a sample from a private well at the Massachusetts Military Reservation. Perchlorate is a chemical used as the primary ingredient of rocket propellants, and it is associated with disruption of thyroid function and thyroid tumors. Perchlorate contamination of groundwater by military operations has become a national problem, affecting hundreds of locations in 20 states. The MADEP Notice of Responsibility warned that the detection of perchlorate in a private water supply well "constitutes a release of a hazardous material resulting in a

Condition of Substantial Release Migration (SRM) and a Critical Exposure Pathway (CEP) pursuant to 310 CMR 40.0000 et seq., the Massachusetts Contingency Plan (the "MCP")." The Notice also stated that the DEP had reason to believe that the finding indicated a "disposal site" as defined by MCP, and indicated that the Army was a Potentially Responsible Party (PRP). Finally, the Notice of Responsibility stated that an Immediate Response Action (IRA) was necessary to eliminate or mitigate the exposure pathway to the residents of the well, and mandated that the IRA plan be submitted to DEP no later than June 10, 2003.

On July 7, 2003, the Army's Impact Area Groundwater Study Program office (IAGWSP) submitted a Rapid Response Action Plan (RRA Plan) to DEP. DEP questioned the intent of the RRA, and in a letter dated July 21, 2003, the IAGWSP responded, "…we acknowledge that the July 7th RRA plan does not strictly comport with all procedural requirements set forth in the MCP….the Army's legal analysis has identified potential constraints upon our authority to comply with procedural MCP-based requirements." Although PEER is not privy to this legal analysis, we understand that the Department of Defense has stated in discussions with various concerned parties that it is immune from such state actions. PEER believes that the Army should accept responsibility for the perchlorate contamination, and agree to remediate the area in accordance with Massachusetts standards, similar to what the Department of Defense recently agreed to do in California. Specifically, the Department of Defense agreed to comply with any final perchlorate regulatory standard promulgated by California, and also agreed not to delay compliance with the California standard until a federal standard is adopted.

It is unconscionable that the Army is refusing to accept responsibility for the perchlorate contamination at MMR, and refusing to comply with all the substantive and procedural requirements of the MADEP order – to the point where the MADEP is forced to provide the affected residents with bottled water – while simultaneously asking for a 25 year lease extension. Given the Army's reaction to the MADEP order, it is difficult for PEER to see how the proposed lease extension will ensure the clean-up of the contamination, and be in the "best interests of the people of the Commonwealth."

Finally, given the DoD's recent and persistent attempts to negotiate exemptions from major environmental laws with Congress, together with Environmental Protection Agency's recent decision to revise its advisory level for perchlorate from 1.5 ppb, established in 2001, to between 4 ppb and 18 ppb, the Commonwealth is the last bastion on the perchlorate front. Moreover, the Army does not yet have written agreements with the four towns surrounding MMR committing the Army to reimbursing the towns for lost water supplies. If Governor Romney signs this lease extension without a firm commitment form the Army to take responsibility for the perchlorate contamination and for municipal reimbursement, he will be pulling the rug out from under his own agency experts, not to mention the citizens of Massachusetts who are exposed to the contamination.

A lease extension is not necessary for the Environmental Protection Agency-ordered clean-up of the base. The proposed lease extension states that "the extended availability

of the leased premises for training activities …. would be consistent with the imperative to ensure the permanent protection of the drinking water supply and wildlife habitat." This language implies that the lease extension is necessary to ensure that the contaminated areas on the base will be cleaned. However, the Army is under a unilateral order from the Environmental Protection Agency (EPA) to clean up the base. Therefore, the Army is being disingenuous when it implies that the lease extension is necessary for the clean-up.

Proposal for "Center for Homeland Security" must be included in lease extension proposal. One of the primary reasons for the lease extension is the proposed "northeast Regional Center for Homeland Security" at MMR. PEER believes that the details associated with the Center for Homeland Security proposal must be considered together with the proposed lease extension; to do otherwise would be improperly piecemealing the projects, and would result in a failure to examine cumulative impacts. The proposed center appears to involve a training center, infrastructure and transportation improvements, personnel housing, and a host of other facilities and infrastructure improvements. The scope of the proposed Center is very vague, but certainly has the potential to be a massive re-development. Since the Massachusetts National Guard is planning to conduct an Environmental Assessment (EA) of the proposed Center pursuant to NEPA, it makes sense to combine the proposed lease extension with the proposed Center for Homeland Security, and prepare an EIS for both actions. To examine these two actions separately would violate one of the Guiding Principles of the Community Working Group: "Cumulative environmental impacts will be considered in making decisions about future uses" (See p. 22 of the Final Environmental Impact Report (FEIR) prepared pursuant to the Massachusetts Environmental Policy Act (MEPA), May 15, 2001).

The environmental performance standards contained in the FEIR are not as stringent as current state law, and therefore should not be prolonged with a lease extension. PEER does not believe that the environmental performance standards set forth in the FEIR adequately protect the wildlife habitat on MMR. For example, the FEIR states that "[m]ost if not all of the wetlands in Camp Edwards are considered vernal pools" (FEIR, p. 31, Comment 2.5). However, the environmental performance standards state that "Activities will be managed to preserve and protect wetlands and vernal pools as defined by applicable, (sic) federal, state, and local regulations. This will include replacement or replication of all wetland resource buffer areas which are lost after completion of an activity or use."

This standard is contrary to the standards contained in the Wetlands Protection Act regulations and the Massachusetts Water Quality regulations. Specifically, certified vernal pools are Outstanding Resource Waters (ORWs) in Massachusetts. 314 CMR 4.04(3). Furthermore, virtually all new or increased discharges are prohibited into ORWs (314 CMR 4.04(3)(b)), and no discharge of dredged or fill material is allowed into a vernal pool unless a variance is granted (314 CMR 4.06(1)(d)11). Vernal pool habitat is defined as the pool itself, "as well as the area within 100 feet of the mean annual boundaries of such depressions…." 310 CMR 10.04. The performance standards

contained in the FEIR appear to allow alteration of the vernal pools and their buffer zones to the extent that they may require "replacement or replication." If an area requires "replacement or replication," it is implicit that such area has been degraded or destroyed to such an extent that it no longer functions as it did. Such degradation or destruction is contrary to existing regulations.

Another example of a less stringent performance standard contained in the FEIR is Comment 2.6 on page 31 of the FEIR. This standard claims that activities will be "prohibited within the wetlands and their 100-foot buffers, except…those where no practicable alternative to the proposed action is available." This language is far less stringent than the regulations at 310 CMR 10.55(4) for Bordering Vegetated Wetlands.

Finally, the Memorandum of Agreement signed by Acting Governor Jane Swift on October 4, 2001 states that state enforcement agencies shall have access to the northern 15,000 acres of the MMR to inspect the environmental impact of military activities, but only "upon proper notice." Typically, enforcement inspections are conducted without any notice to the potential violator. While PEER understands the need to protect the safety of the state enforcement inspectors, we believe that state enforcement agencies should be able to inspect the MMR for environmental infractions without notice to the Army. If inspectors show up at MMR, military activities that could compromise the safety of state employees could temporarily cease during the inspection, or inspectors can wait until the activities are over.

Until the performance standards in the FEIR and the agreements in the MOA are strengthened so that they are equivalent to existing state laws and regulations, PEER believes the Commonwealth would be remiss in signing a lease extension that incorporates these documents.

The proposed lease extension may conflict with Article 97 of the Massachusetts Constitution. Article 97 of the Massachusetts Constitution states in part, "…the general court shall have the power to provide for the taking, upon payment of just compensation therefore, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes. Lands and easements taken or acquired for such purposes *shall not be used for other purposes* or otherwise disposed of except by laws enacted by a two-thirds vote, taken by yeas and nays, of each branch of the general court" (emphasis added). Article 97, which was added to the Constitution in 1972, was intended to ensure that lands obtained by the Commonwealth for conservation were not converted to other incompatible uses.

In 2002, Acting Governor Jane Swift designated the northern 15,000 acres of MMR as Article 97 protected open space under the Massachusetts Constitution. A long-term management plan for the MMR's northern 15,000 acres is currently in place to ensure the permanent protection of Upper Cape Cod's drinking water supplies and wildlife habitat. Given the Army's current reaction to MADEP perchlorate orders, coupled with the vague plans for massive redevelopment of MMR, PEER believes that the lease extension may give the Army the flexibility to use the northern 15,000 acres of MMR for purposes

inconsistent with protection of drinking water supplies and wildlife habitat. Until the Army explicitly lays out its plans for MMR during the proposed 48 year lease, and until an analysis can be done to demonstrate that there will be no incompatible uses of this land, PEER does not believe that the Commonwealth has the authority to sign the lease extension.

CONCLUSION

PEER strongly urges the Commonwealth to forego signing the proposed lease extension. Before the Commonwealth agrees to sign away its own land for 48 years, it should ensure that the proposals for the MMR are consistent with the laws and best interests of the citizens of the Commonwealth. As currently proposed, this lease extension is not in the best interests of the Commonwealth. Moreover, PEER sees no reason for the Commonwealth to enter into this agreement at this time.

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

Sincerely,

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