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April 30, 2013

Massachusetts Department of Environmental Protection
Bureau of Resource Protection – Regulatory Comment Box
One Winter Street, Fifth Floor
Boston, MA 02108

RE: Proposed Changes to Wetland/Waterway/Water Quality & Wastewater Regulations

To Whom It May Concern:

The Berkshire Regional Planning Commission (BRPC) appreciates the opportunity to provide written comments on the proposed amendments to 310 CMR 10.00 - Wetlands Protection Act, 310 CMR 9.00 - Waterways, and 314 CMR 9.00 - 401 Water Quality Certification for Discharge of Dredged or Filled Material, Dredging, & Dredged Material Disposal, and the repeal of 314 CMR 7.00 Sewer Connection and Extension Regulations. We also have an overall comment on the delegation of additional responsibilities to the local level and its capacity to adequately enforce state regulations.

It is our understanding that due to major budget cuts, MassDEP has experienced a significant reduction in capacity and must make decisions on how to most effectively deploy its current resources. BRPC supports MassDEP's efforts to seek regulatory and procedural efficiencies and prioritize its activities and initiatives. It is BRPC's position that proposed reforms should not weaken or undermine environmental protection standards, reduce public process, transfer responsibilities to municipalities, or weaken local review.

BRPC does not have in-depth technical expertise related to the regulations in question, but rather is submitting broad comments related to the issues that we believe will most likely impact our constituency to the greatest degree. BRPC's comments are designed to advise MassDEP on the general considerations that we believe should be addressed.

Title V

It appears that more regulatory authority is being assigned to local Boards of Health with a reduced role by DEP. BRPC has concerns that many local Boards of Health do not have staff capacity or expertise for some levels of technical review. Assistance from DEP is still needed. At a minimum, significant funding and training needs to be provided for those boards that will have additional responsibilities.

Limited Project Status

Limited project status is proposed for two new types of projects – access roads to renewable energy project sites and Ecological Restoration Projects. In the past, limited project status was usually limited to minor activities which

constituted maintenance of existing facilities and agricultural areas. The two new types of limited projects are altogether different in scale from those which historically were limited projects. This major change in approach causes considerable concern. Although the regulations list the types of projects that qualify as limited projects, the regulations are unclear as to what limited project status means. Changes to the regulations should include an explicit definition of limited project status. It is our understanding that limited projects do not need to meet all of the performance standards. Therefore, it is anticipated that limited projects may not meet all of the interests of the Wetland Protection Act. BRPC is concerned that without clearly defining limited project status the grounds for appeal may be open for broad interpretation while the ability to condition such projects through a superseding order of conditions may be restricted.

Limited Project Status for Renewable Energy Projects

MassDEP proposes a new limited project status for the construction of a new access roadway, or the improvement, repair and/or replacement of an existing access roadway, needed to transport equipment to a renewable energy project site. However, there are already limited project provisions for the construction and maintenance of a new roadway or driveway to access an upland area of the same owner. In the Berkshires, wind turbines are built on the ridgelines, at the headwaters of low-order, high-gradient streams. Many access roads required for renewable energy projects traverse steep slopes, support significant weight, and are utilized to transport oversized loads. Construction in these environments requires enhanced erosion and sediment controls and the Wetlands Protection Act provides the only standard regulatory mechanism to review and permit these impacts. BRPC is concerned that there will be significant impacts to resource areas if these projects are not required to meet all of the performance standards or replicate wetlands. BRPC believes it is inappropriate to provide special treatment for a specific use through limited project status and does not believe that limited project status is needed for renewable energy projects. We believe that granting of limited project status to renewable energy projects will result in a significant decrease in meeting other important public policy objectives, in this case, the protection of the state's waters and important wetlands resources. In addition, BRPC has concerns with regard to potential off site impacts, such as impacts to public roads resulting from widening of shoulders.

Ecological Restoration Projects

The newly defined Ecological Restoration Projects have been added to 310 CMR 10.00 - Wetlands Protection Act, 310 CMR 9.00 - Waterways, and 314 CMR 9.00 - 401 Water Quality Certification for Discharge of Dredged or Filled Material, Dredging, & Dredged Material Disposal. Ecological Restoration Projects may receive limited project status and may be eligible for General Permits. As expressed earlier, it is a concern that limited project status is not clearly defined and that limited projects are not required to meet all of the performance standards. In addition, it is a concern that Ecological Restoration Projects may be permitted under a General Permit. BRPC has the following concerns with regard to the Ecological Restoration Projects:

- local conservation commissions are precluded from imposing any conditions over those contained in the General Permit provisions;
- appeals can only be made on the basis that the applicant did not comply with one or more of the applicable procedural requirements and/or the conservation commission issued the General Order of Conditions in contravention of one or more of the applicable eligibility criteria;
- effectively eliminates local review; and
- improvement dredging and the disposal of dredged material will be allowed within Areas of Critical Environmental Concern.

BRPC understands the need for MassDEP to carefully deploy limited resources and supports the concept that many restoration activities do not warrant MassDEP scrutiny. However, as currently drafted the definition of an Ecological Restoration Project is open to broad interpretation and does not take into consideration the magnitude of the project. BRPC remains concerned that while preserving MassDEP's limited resources the local review and purview of the Conservation Commission as the permitting authority has been hampered.

BRPC is opposed to any change that would allow dredging and dredged material disposal within an ACEC. By designation of an ACEC, the State has determined that these are especially important ecological areas and thus should be provided the highest level of environmental review and protection. The proposed changes appear to be in contradiction to that. The cleanup of PCB contamination in the Housatonic River is of particular concern. It appears that this project would qualify as an Ecological Restoration Project despite the magnitude of the project. The probable course of action for cleaning up the Housatonic River of the PCB contamination involves dredging of Woods Pond (along with other areas north of the Pond). This section of the Housatonic River is entirely within the Upper Housatonic Area of Critical Environmental Concern. The General Electric Company has made no secret of its desire to dispose of all the contaminated material in disposal sites within Berkshire County, including the most probable site at Lane Construction Company's site in very northern Lee, which is within the Upper Housatonic ACEC.

Sewer Connection and Extension Regulations

We question the elimination of sewer extension and connection approvals by DEP, at least in their entirety. We realize that DEP still would have regulatory authority to ensure that the receiving wastewater treatment plants have overall adequate capacity and are not exceeding their permitted flows. However, the MEPA review which can be triggered by a sewer extension based on its needing a sewer extension permit is important in maintaining the Commonwealth's Sustainable Development principles. Sewer extensions are a primary tool in promoting further greenfield development outside of more urbanized areas which is something that the Commonwealth has been trying to carefully manage for several decades. We believe that relaxing the State's permitting of extensions will lead to further sprawl development, which then is working against the Commonwealth's greenhouse gas reduction strategies. While it may be appropriate to review thresholds for requiring a state sewer extension permit, we believe that at some level such permits should still be required.

Overall Regulatory Impacts

As stated regarding the Title V amendments, we are very concerned that as DEP reduces its workload in an effort to adjust to current budget realities, it is devolving responsibility to the local level. We would like all of the proposed regulatory reforms to be further reviewed through the lens of their impacts on the scarce or non-existent resources at the municipal level. While it appears that many changes may not trigger an increased workload or demands on local officials, knowing that almost all of our municipalities are struggling to maintain existing services, expecting them to pick up work that previously had been done by DEP is not justifiable. Many of them also have limited if any ability to deal with technically complex permitting issues. If resources are not made available to the municipalities to carry out their increased responsibilities created by these regulatory changes, the end result will be a decrease in the level of protection for Massachusetts' environment.

BRPC is concerned that the proposed changes described above will weaken or undermine environmental protection standards, reduce public process, and weaken local review. We hope that you will take these comments into consideration before finalizing these significant amendments.

Sincerely,

Nathaniel W. Karns, AICP
Executive Director