



SUZANNE M. BUMP, ESQ.
AUDITOR

The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

STATE HOUSE, BOSTON 02133

TEL (617) 727-2075
FAX (617) 727-3014

June 22, 2022

Carl W. McKinney, Town Administrator
Town of Clarksburg
Town Offices
111 River Road
Clarksburg, MA 01247

RE: Department of Environmental Protection Regulations, 314 CMR 16.00 *et seq.*

Dear Mr. McKinney:

This letter is in response to your request relative to the Local Mandate Law, Massachusetts General Laws Chapter 29, Section 27C, and regulations promulgated by the Massachusetts Department of Environmental Protection (DEP) concerning promoting public awareness of sewage pollution, 314 CMR 16.00, as a result of the enactment in January 2021 of Chapter 322 of the Acts of 2020.

In preparation for this determination we met online with you, as well as DEP legal counsel and staff, including Laurel Mackay, Deputy General Counsel, Policy & Programs; Karen Crocker, Chief Bureau Counsel, Bureau of Water Resources; Kathleen Baskin, Assistant Commissioner, Bureau of Water Resources; Lealdon Langley, Director of Watershed Management; and Susannah King, DEP National Pollution Discharge Elimination System Program Chief.

These regulations require the Town of Clarksburg, as the operator of the sewer system, to issue public advisory notices for discharges within set deadlines and post the information to the Town's website. You explain that the Town has no funds available to comply with these requirements, which you believe would require the hiring of IT technicians beyond the part-time person currently available for such tasks. In light of these concerns, you ask whether the Local Mandate Law applies in this case.

Application of the Local Mandate Law to DEP Sewage Pollution Awareness Regulations

Following a thorough review of this matter, the Division of Local Mandates (DLM) has concluded that the Local Mandate Law does not apply to the regulations at issue because they impose obligations that are generally applicable across both the public and private sectors or are incidental local administrative expenses. The following discussion further explains this conclusion.

In general terms, the Local Mandate Law, G.L. c. 29, § 27C, provides that any post-1980 state law, rule, or regulation that imposes additional costs upon any city or town must either be fully funded by the Commonwealth or be made conditional to local acceptance. Pursuant to the Local Mandate Law, any community aggrieved by an unfunded state mandate may petition the Superior Court for an exemption from complying with the mandate until the Commonwealth provides sufficient funding. Prior to taking this step, a city or town may request an opinion from DLM as to whether the Local Mandate Law applies in a given case, and, if so, a determination of the cost for complying with the unfunded mandate. DLM's deficiency determination is *prima facie* evidence of the amount of funding necessary to sustain the local mandate.¹ Alternatively, a community may seek legislative relief.

The Local Mandate Law, however, does not shield cities and towns from every type of state requirement resulting in additional local spending. Our courts have ruled that Chapter 29, Section 27C, applies only to state laws and regulations adopted after 1980 that impose cost obligations upon *cities and towns*; it does not apply to generally applicable state requirements that govern public and private sector activities alike. *See Town of Norfolk v. Department of Environmental Quality Engineering*, 407 Mass. 233 (1990), and *City of Cambridge v. Attorney General*, 410 Mass. 165 (1991).

In the instant matter, most of the regulations at issue apply both to public and private sector activities. A permittee is defined in the regulations as “[a] person granted a permit under M.G.L. c. 21, § 43, and 314 CMR 3.00: *Surface Water Discharge Permit Program*, or the NPDES [National Pollutant Discharge Elimination System] permit program, to operate and maintain a particular outlet for the discharge of pollutants into surface waters of the Commonwealth; a person operating a sewer system; or a person discharging pollutants from an outlet without a required permit or in violation of a valid permit.” 314 CMR 16.02. Therefore, the obligations under the regulations are imposed on varied public and private sewer operators, including municipalities, special districts, the Massachusetts Water Resources Authority, and operators of private wastewater systems.

¹ See M.G.L. c. 29, § 27C (e).

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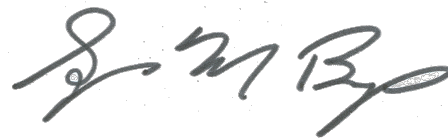
In addition, there are some subsidiary obligations imposed on the local boards of health or health departments in municipalities impacted by a discharge or overflow. Under 314 CMR 16.09(1), a board of health or health department must issue a public health warning under specific circumstances, including certain types of Sanitary Sewer Overflows, upon receipt of a public advisory notification from a permittee. To send out this warning, a board of health or health department “shall use existing emergency notification systems, including if available, a reverse 911 emergency call system.” 314 CMR 16.09(2). These obligations, however, fall within the exception to the Local Mandate Law for incidental local administrative expense, *see* Chapter 29, Section 27C(a) & (c), because they are “relatively minor expenses related to the management of a municipal service and ... are subordinate consequences of a municipality’s fulfillment of primary obligations.” *City of Worcester v. Governor*, 416 Mass. 751, 758 (1994).

In light of the *Norfolk* and *Cambridge* decisions and the limitations for incidental local administrative expenses set forth in the *Worcester* decision, DLM concludes that the Local Mandate Law does not apply in this case. We regret that this opinion does not aid the Town’s efforts to deal with budget constraints.


Conclusion

This opinion does not prejudice the right of any city or town to seek independent review of the matter in Superior Court in accordance with Section 27C(e) of Chapter 29. Although we are sympathetic to the fiscal constraints facing all cities and towns, DLM must apply the Local Mandate Law consistently to each issue, as interpreted by the courts.

Sincerely,

A handwritten signature in black ink, appearing to read "Suzanne M. Bump".

Suzanne M. Bump
Auditor of the Commonwealth

cc:  Governor Charlie Baker
Senate President Karen E. Spilka
Speaker of the House Ronald Mariano
Senator Adam G. Hinds
Representative John Barrett III