

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION: Report to the Senate and House of Representatives – National Pollutant Discharge and Elimination System Authorization

EXECUTIVE SUMMARY

In Chapter 139 of the Acts of 2012, Section 209, the Massachusetts Legislature required “*the department of environmental protection shall evaluate the feasibility, cost, advantages and disadvantages of obtaining from the United States Environmental Protection Agency, to the extent permitted by federal law, delegated authority over National Pollutant Discharge Elimination System programs. The department shall file a report detailing its finding together with drafts of legislation necessary to obtaining such authority, with the clerks of the senate and the house of representatives not later than July 1, 2013.*” This report was prepared in response to the Legislature’s directive. It is organized as follows:

**Part I: NPDES Program Background**

**Part II: Feasibility, Cost, Advantages, Disadvantages**

**Part III: Draft Legislation**

MassDEP organized an advisory committee to assist in evaluating the concerns, costs, and benefits of NPDES delegation. The advisory committee (hereafter “Advisors”) was made up of stakeholders with varying expertise and perspectives including: watershed and environmental advocacy organizations, municipalities (including managers of water infrastructure systems), state environmental agencies, financial managers, attorneys, and consulting engineers. The Advisors were not asked to specifically recommend whether MassDEP should apply for delegation nor were they asked to endorse the content of this report. However, they provided invaluable assistance, feedback, and advice to MassDEP. A brief synopsis of the report’s content and findings is provided below.

**NPDES Program Background**

The principal law governing pollution of the nation’s surface waters is the Federal Water Pollution Control Act, or Clean Water Act (“CWA”). Based on the premise that “[n]o one has the right to pollute,” the Act declared “the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.” In order to help achieve this goal, the Act provided for a “National Pollutant Discharge Elimination System” (“NPDES”) permitting scheme.

The CWA allows States to request authority from EPA to administer the NPDES permit program. The assumption of control over the NPDES program is known as “delegation.” Under the CWA EPA must approve a State’s request to operate a NPDES permit program if it determines, that the State has adequate legal authorities, procedures, and the ability to administer the program. At all times following authorization, State programs must be consistent with minimum federal requirements, although they may always be more stringent. If a State program does not remain consistent, EPA may withdraw its authorization.

As of June 2013, 46 states had been authorized to administer the federal NPDES permit program. EPA New England has four delegated states: Connecticut, Maine (except for facilities located in Indian country), Rhode Island and Vermont and two non-delegated states: Massachusetts and New Hampshire. The other non-delegated states in the union are Idaho and New Mexico. That means the federal

government is in charge of the permit issuance, compliance and enforcement for the 2990 NPDES permit holders in Massachusetts.

### **Feasibility, Cost, Advantages, and Disadvantages**

#### *Feasibility*

MassDEP must have the financial and technical capability to successfully administer the NPDES program. Appropriate resources would need to be available so that the Commonwealth could administer the NPDES programs in a manner which improves upon the way the program is administered in Massachusetts today. The feasibility of MassDEP obtaining authorization from EPA and administering the NPDES program is completely reliant on the following program improvements:

- expanded science support;
- enhanced staffing resources for permitting, compliance and enforcement; and
- advanced information technology capability.

Without significant improvements in these areas, MassDEP and the Advisors raise caution about MassDEP's ability to effectively administer NPDES programs.

#### *Cost and Sources of Funding*

MassDEP estimates that administration of the NPDES program would cost approximately \$9.5 million per year. If delegation were to be pursued a more rigorous cost estimation process that included possible program changes would need to be conducted. Three possible sources of additional NPDES funding were examined. They include fees paid by permittees, general legislative appropriations, and a wastewater assessment fee which is paid by rate payers and is based on wastewater flow. The wastewater assessment fee would be the most significant and reliable source of funding. However a combination of these funding sources would likely be necessary.

#### *Advantages*

The following were identified as potential advantages:

1. MassDEP is better equipped to concentrate on Massachusetts –specific issues and develop permits with a more complete understanding of local conditions.
2. MassDEP jointly issues NPDES permits with EPA. Having MassDEP as the one permitting authority with EPA limited to an oversight role could result in a more efficient permitting process.
3. If properly funded, pursuing delegation creates the opportunity for implementing improvements in how the current NPDES program is administered. From incremental improvements to the existing system to significant program redesign and the heightened use of science in NPDES program decisions, such changes would improve the way the Commonwealth protects our water bodies.
4. A state agency may be better positioned than EPA to implement integrated water planning. Integrated planning is a process designed to work with permittees who have competing

requirements that arise from separate wastewater and stormwater projects in order to meet their NPDES obligations.

5. The program redesign and fee structuring components of delegation would give MassDEP the opportunity to look and act more broadly to better protect water quality in Massachusetts. That could include better coordination on managing all pollution sources in a watershed.

### *Disadvantages*

The following were identified as potential disadvantages:

1. EPA has had a largely successful role in protecting the Commonwealth's water bodies. --. MassDEP's status as a state executive agency could make it inherently more subject to political pressure from some permittees to produce permit decisions less protective than those that EPA might have issued.
2. MassDEP would need to develop the capacity to run the program in a fairly short time. The complex set of program, funding, legislative and management changes that accompany delegation would take time to accomplish.
3. If MassDEP was authorized to administer the program, the ability to change course and hand it back to EPA is extremely limited.
4. The risk of inconsistent or funding shortfalls is high and could cause a backlog of science, permitting, and compliance and enforcement. In those instances DEP would not be able to adequately fulfill its responsibility to protect the Commonwealth's waters.
5. To assume delegation of the program will cost the Commonwealth and its rate payers millions of dollars every year.

### **Draft Legislation**

Current authority in the Massachusetts Clean Waters Act is broad enough in scope to generally assume authority for the NPDES program. Nonetheless, the Legislature may need to make modest adjustments to the Massachusetts Clean Waters Act's current legal framework in order to ensure that the state authority conforms to specific federal requirements.

### **Conclusion**

Whether or not MassDEP pursues delegation is more than a question of who does NPDES work, MassDEP or the EPA. It is a question of whether sufficient resources will be made available for MassDEP to conduct the science-based work need to support the administration of the NPDES program. Questions related to the funding and incorporation of peer reviewed science, integrated planning, allocating resources, assuring adequate funding, and equitable approaches to reducing pollution from all sources must be explored further. Applying for NPDES delegation without also addressing these other questions would set the delegation process up for failure. Regardless of whether MassDEP proceeds to seek delegation -- any course of action that does not include increasing the Department's science capabilities would be a missed opportunity for improving water quality while also having a carefully coordinated approach to watershed management.