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Is it better for Communities to Answer to EPA or MassDEP when it comes to Protecting Water Resources?

Under terms of the federal Clean Water Act (CWA), end-of-pipe wastewater discharges into water bodies are regulated by the National Pollutant Discharge Elimination System (NPDES) program. The NPDES program can be administered either by states or federally by the US Environmental Protection Agency (EPA). EPA currently administers the program in Massachusetts. Lately, there has been a significant amount of study, discussion, and debate about the wisdom and feasibility of delegating authority to administer the program to the Massachusetts Department of Environmental Protection (MassDEP).

We know it's better to keep water local. Is it also better to keep regulatory matters local? Read on to learn more about what delegation would mean for MassDEP, and what MCWRS thinks this change to the permitting process would mean for communities. Either choice has advantages and disadvantages, and MCWRS wants to be sure communities' interests are protected. Tom Walsh, a founder of MCWRS and Director Emeritus of the Upper Blackstone Water Pollution Abatement District, sits on MassDEP's advisory committee that is exploring the delegated authority option.

Taking Local Control of Clean Water Act Permitting¹

For almost five decades, MassDEP (and predecessor agencies) has periodically explored the possibility of requesting authority to administer the NPDES permit program from EPA. The program issues permits to facilities (public and private) that discharge wastewater from a pipe into water bodies. NPDES was developed to reach the CWA goal of eliminating pollution by placing limits on these sources. Massachusetts (along with New Hampshire and Idaho) is one of only three remaining states that do not have delegated authority to issue NPDES permits. This means that EPA maintains control over permits, compliance, and enforcement for the almost three thousand NPDES permit holders in Massachusetts.

When states assume control of permitting, EPA continues to monitor performance to ensure the program is at least as stringent as the federal requirements. And, the agency can withdraw its authorization if the state fails to meet delegation obligations.

¹ Massachusetts Department of Environmental Protection. (2013). *Massachusetts Department of Environmental Protection Report to the General Court of the Commonwealth on the Topic of NPDES Authorization* (Rep.). Boston, MA.

States must have adequate legal authority and procedures and be able to administer the program. Other key considerations in granting a state's request for delegation are feasibility and cost.

In Massachusetts' case, MassDEP must have more financial resources to provide adequate support for the science that's behind setting permit limits – data collection, analysis, and modeling. Additional resources are also necessary for the agency to keep up with the ever-changing federal requirements, properly evaluate rapidly changing treatment technologies, and have sufficient, sound scientific evidence for legal challenges. Staffing requirements will also increase significantly with delegation. MassDEP will need to assign enough staff to meet permitting, compliance, and enforcement needs. Finally, the agency must enhance its information technology capabilities to streamline information sharing, including filing reports and analyzing information to identify permittees that are out of compliance. Without these improvements, MassDEP's ability to effectively administer the NPDES program is seriously compromised.

Cost is another factor. After further evaluation, the most recent estimates of the agency's annual funding needs to afford delegation costs is about \$6 million, down from an earlier estimate of \$12 million. To meet this need, MassDEP could charge permit fees, receive appropriations, or collect an assessment fee from ratepayers based on wastewater flow. The latter would be the most reliable source, but it's more likely that the agency would have to use a combination of these funding sources to meet its needs. It's a daunting prospect, and process, but MassDEP thinks it's up to the challenge and wants delegated authority.

There are five key potential advantages to delegation:

- MassDEP has a better understanding of local conditions and can focus specifically on Massachusetts.
- MassDEP already issues a state permit, so delegating would eliminate the duplicative process and create efficiencies.
- If funded sufficiently, delegation would lead to better science and improved permitting and protection for resources.
- A locally managed process would make it easier for communities to implement integrated planning of all water resources (including drinking water, wastewater, and stormwater), since EPA does not regulate programs such as those for drinking water.
- Better management of all pollution sources in a watershed would result from a redesigned program and realistic funding.

There are five key potential disadvantages:

- The federal government bears the cost now, but with delegation Massachusetts tax or ratepayers would be responsible for millions of dollars each year in program funding.
- MassDEP could be subject to more political pressure as a state agency.
- Capacity to administer the program would need to be created quickly.
- It could be difficult to return the program to EPA, should the state decide it no longer wants to administer it.
- Funding issues could cause a backlog of science, permitting, compliance, and enforcement activities.

MCWRS Recommendations to Protect Communities' Interests

MCWRS supports delegating the NPDES program to MassDEP, with several important caveats to ensure that it is successful and sustainable. Using our neighbor to the north as an example, MassDEP learned that Maine's additional staffing needs were just 25 percent of what EPA estimated the state would need. Yet, with this smaller staff, permitting backlogs that had existed for years were eliminated. This demonstrates that some of the challenges that EPA lists for assuming delegated authority may not be quite as dire as initially presented. However, the choice to request delegation warrants additional investigation before embarking on the process, which needs legislative support. Our caveats include:

- Because everyone benefits from clean water, the burden should not fall entirely on ratepayers. MassDEP will need adequate funding from the Legislature and support from the Executive Branch.
- The program needs to be science-driven with sound data, not dictated by permit writers.
- Any fees or taxes collected should be invested in a dedicated fund, not the general fund.
- There should be a cap on what any one community has to pay, and cost/benefit analyses should ensure costs to communities don't outweigh environmental benefits.
- The data driving decisions must be thoroughly vetted for appropriate QA/QC protocols. There may be cost savings on the science side if water quality data and other information collected by organizations other than MassDEP can be used. However, the organizations must have a robust and scientifically defensible Quality Assurance Plan (QAP). At present, there is considerable variation on the quality of QAPs. They should be subject to appropriate scrutiny and standards.
- There should be oversight and participation by the permitted community. MassDEP should establish an advisory or steering committee to serve this purpose for as long as the state has delegated authority.
- MassDEP Boston headquarters must ensure that its policies and priorities are clearly articulated and followed by regional office staff.

MCWRS believes delegation could be immensely beneficial to the communities of Massachusetts, but the basis for the decision to move forward and the redesigned program must be thoroughly researched and the permitted community engaged in a transparent process. If the program is executed with such considerations, MassDEP will be better equipped to address the local needs of the environment and permittees than a federal agency such as EPA.