



October 10, 2017

Honorable Anne Gobi, Senate Chairwoman
Joint Committee on the Environment, Natural Resources and Agriculture
State House Room 513
Boston, MA 02133

Honorable William Pignatelli, House Chairman
Joint Committee on the Environment, Natural Resources and Agriculture
State House Room 473F
Boston, MA 02133

Testimony emailed to Serafina.Zeringo@mahouse.gov and Robert.Libin@mahouse.gov.

Dear Senators Gobi and Pignatelli:

The Mystic River Watershed Association, whose mission is to protect and restore the Mystic River, its tributaries and watershed lands for the benefit of present and future generations, opposes H.2777, *An Act to Enable the Commonwealth's Administration of the Massachusetts Pollution Discharge Elimination System*, a bill filed by Governor Baker on March 8, 2017.

Background. Currently, the U.S. Environmental Protection Agency (EPA) regulates discharges of stormwater, wastewater and industrial pollution in Massachusetts under the federal Clean Water Act. The permits granted for these discharges are referred to as NPDES (National Pollutant Discharge Elimination System) permits and are co-issued by the Massachusetts Department of Environmental Protection (MassDEP). The Governor's legislation seeks to shift the primary responsibility from EPA to MassDEP, giving the state agency "primacy" to issue the permits with EPA oversight. This effective administration of the NPDES program is critical to safeguarding public health and the environment in the Commonwealth. This proposed delegation of authority to the Commonwealth would for all intensive purposes be permanent.

Steps to primacy. To take over the NPDES program, MassDEP must demonstrate to the EPA that it has a stable and adequate funding source; a program plan, with adequate staffing; and laws and regulations that meet Clean Water Act standards.

We oppose the proposed delegation of the NPDES permitting program to MassDEP for the following reasons:

1. The funding proposed for the NPDES program is insufficient and vulnerable to future budget cuts. The NPDES permitting program is expensive and its transfer to the state would burden our already tight state budget. The program does not come with any new federal funding. The state would have to find new money to fund the program.

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- The funding proposed for a delegated NPDES program is inadequate. A MassDEP 2013 feasibility study¹ estimated the annual cost to the state at \$9-10M. Yet Governor Baker has proposed to dedicate just \$3.2M in new funding for MassDEP staff, with an additional \$1.5M for contractors.
- The only funding mechanism proposed, an annual legislative appropriation, would leave the program vulnerable to funding cuts. Fee assessments directed to a dedicated fund would be a more secure and fair source of funding. MassDEP proposed this idea in the past but abandoned it in response to pushback from polluters.
- We would encourage more dialogue on developing sustainable funding from permit fees. Data collected by the Environmental Council of the States indicates that states that derive a significant fraction of their environmental agency's budgets from fees are more responsive permitters; they have a smaller percentage of NPDES permits that have failed to be renewed and kept current.
- The Trump administration has proposed a 31% budget cut in Clean Water Act (section 106) federal assistance to states. This would be slightly over \$1M in Massachusetts. While the magnitude of this cut is still uncertain, it is likely that federal funding for MassDEP's clean water programs will *decline* in the near term.
- It makes no sense to transfer a federally funded program to the state with budgets this tight. This is an unnecessary state expense and MassDEP has far more pressing fiscal needs.

2. MassDEP lacks staff to meet its existing Clean Water Act obligations and should not take on an additional program at this time.

- MassDEP has lost 30% of its staff since 2009 due to budget cuts and early retirements. With just 655 full-time employees, the agency is at its lowest staffing level since 2005.
- Beyond the absolute numbers of staff lost at the agency in recent years, there is the compounding effect that the lost staff have systematically been the most experienced and technically oriented personnel at the Department. The Department's published staffing records show that, among all the roles at the agency, the environmental engineering and regional planning staff have been particularly strongly reduced over the past several years. Furthermore, the Baker administration's buyout program has generated especially steep declines in the average seniority of staff in these positions in the past two years. Reporting from the Springfield Republican at the onset of the buyout program emphasized what impacts it would have; quoting a Department employee, "The institutional knowledge of how to enforce the regulations that we're supposed to enforce, and the history of what led to our current policies, a lot of that's going to be lost."
- As a result of chronic underfunding and understaffing, MassDEP is unable to meet programmatic goals and struggles with:
 - A backlog in issuing water supply permits and conducting five-year permit reviews;
 - Multi-year, even *multi-decade*, delays in monitoring, assessing and reporting;
 - Discontinued development of pollution control plans; and
 - Weak and inconsistent enforcement and compliance for water pollution rules.
- MassDEP should fulfill its existing obligations before pursuing delegation.

3. Permit appeal process in Massachusetts is much less favorable to protections to the environment compared to appeals at the Federal level.

- The Environmental Appeals Board (EAB) handles appeals to NPDES permits when managed by the federal government. The EAB acts independently from the Administrator of the EPA and counterbalances instances when an agency has been captured by industry. If the NPDES program is delegated to the Commonwealth of Massachusetts – an appeal would be handled by dispute resolution (OADR) within the MassDEP. The presiding officer in the dispute resolution program reports directly to the Commissioner of MassDEP and ultimately the Commissioner signs off on and can alter the judgement. This raises concern that dispute resolution does not come to a fair and independent resolution if the agency is the subject of political pressure or regulatory capture.

4. Water quality would suffer in Massachusetts.

- Proponents of delegation hope that MassDEP will be more “flexible” with pollution control requirements. Our understanding of how this will work is that permittees will be provided longer compliance timetables, a reduction in enforcement activity or nonassertive enforcement that creates an enforcement shield. The outcome is more pollutants to enter waterways and for longer time periods, harming both the environment and public health.
- MassDEP is more vulnerable than EPA to political pressure from permittees to weaken permits. MassDEP is appropriately a partner to municipalities – there are shared goals on public access and protecting the environment.
- A recent disappointing decision by MassDEP on the state’s general stormwater permit (MS4) dashed hopes that the state would stand up for water quality in the face of federal inaction. When EPA headquarters chose to delay implementation of the permit for one year, MassDEP could have implemented this permit on its own. Instead, the state instituted its own delay, arguing that they would prefer to wait for EPA to take action first.²
- While forty-six states have taken primacy of the program, chronic problems due to insufficient funding or lack of political support have led to 49 legal petitions to take back or “de-delegate” the program in 31 states. EPA has never done so.

5. EPA has been a good steward of our water.

- Our state has seen dramatic improvements in water quality since the agency was established in 1970; EPA Region 1 has a well-deserved reputation as a national leader in water pollution control. The Charles River, for example, is considered one of the cleanest urban rivers in the country. The Nashua, the Assabet, the Merrimack, the Blackstone, and Boston Harbor have all seen enormous improvements thanks to EPA oversight.

² The last MS4 permit, issued in 2003, expired in 2008. This permit is now *nine* years overdue and progress on cleaning up stormwater, the state’s worst water pollution problem, has stalled in many areas throughout the state.

- EPA has been a good steward of our water for nearly fifty years, during both Democratic and Republican administrations, and we should expect that future administrations will again take this important responsibility seriously. Transfer of the program would take several years, and by the time EPA has relinquished control, a new administration would likely be in place in Washington. We should not make a permanent change based on a temporary political situation.
- Although EPA has primacy, MassDEP and EPA “co-issue” pollution permits in Massachusetts. This has long insured carefully balanced permitting, with weight given to both municipal budgetary concerns and water quality improvements.

6. Our experience in the Mystic River Watershed

- During the past decade, while there has been a renewed attention by the public and regulatory agencies to address stormwater pollution we have seen little progress made by MassDEP in addressing illicit connections and stormwater from our communities. MassDEP is not holding the cities and towns to deadlines to eliminate illicit sources of bacteria contamination that have gone on for decades. There is a clear difference in our watershed in the communities where EPA has gotten involved and developed a timeline for full compliance – water quality is improving.

We recommend the following course of action, which will most benefit our environment and economy:

1. Do not pass H.2777 this session. Delegation is permanent. NPDES program approval is a high-stakes gamble for a state that has struggled to adequately fund water protection programs and certify EPA permits. As MassDEP reported in 2013, “EPA has had a largely successful role in protecting the Commonwealth’s waterbodies.” There is no pressing need for this change and there is too much at stake to rush this decision.

2. Fix it first. Restore MassDEP’s funding so it can fulfill its existing responsibilities to safeguard water quality and public health and safety in Massachusetts. We urge the legislature to support H. 2139, *An Act to improve water quality and pollution control programs*, which would require an independent analysis be conducted of MassDEP water quality programs to ensure that they meet the goals of the state and federal Clean Waters Act.

Specifically, before seeking to take on this new program, MassDEP should have additional, stable funding to restore and improve its current programs, including:

- A water quality program that meets EPA’s highest standards.
- Timely development and implementation of water quality improvement plans.
- Strengthened partnerships with watershed associations, including the ability to incorporate quality-assured third party data into MassDEP’s water quality database.
- Improved compliance with and enforcement of MassDEP permits.
- A robust field-based program of compliance and technical assistance for permittees.

3. Before moving ahead with legislation. A demonstrated increase in state funding and improved performance of MassDEP’s existing water program responsibilities should be a precondition for any future decision to seek delegation. MassDEP needs to provide a clearer description of expected

efficiencies and environmental benefits from delegation. In addition, MassDEP's program plan for the NPDES program must insure adequate, stable, and sustainable funding for this important program, improve the permit appeals process, and shield the agency from political interference.

Thank you for your time and consideration. We look forward to working together with the Legislature to strengthen the state's water protection programs. Please feel free to contact Patrick Herron, Executive Director, Massachusetts Watershed Association, patrick@mysticriver.org, if you have any questions.

Sincerely,

A handwritten signature in black ink, reading "Patrick Herron". The signature is written in a cursive, flowing style.

Patrick Herron
Executive Director
Mystic River Watershed Association
Arlington, MA