

# BANKER & TRADESMAN

THE REAL ESTATE, BANKING AND COMMERCIAL WEEKLY FOR MASSACHUSETTS

A PUBLICATION OF THE WARREN GROUP

## OPINION

PROS AND CONS

### MassDEP Should Run The NPDES Program

After Careful Consideration – For More Than 40 Years – A Decision To Change

BY ROBERT D. COX JR.

SPECIAL TO BANKER & TRADESMAN

Massachusetts has long been recognized as a leader among states in establishing environmental standards and implementing highly successful environmental regulatory programs. Consider, for example, Massachusetts' privatized waste site clean-up program. It embodied new ideas and regulatory innovations that increased the rate of cleanups. But when it comes to wastewater discharge, Massachusetts has no such distinction. This is because the federal Environmental Protection Agency (EPA), not the state, is chiefly responsible for wastewater permitting.



ROBERT D. COX JR.

That should soon change. After decades of considering a potential state-run wastewater permitting and compliance program, the Baker-Polito Administration has decided it is time for Massachusetts to change. MassDEP is taking steps to obtain authorization from EPA to run its own wastewater discharge program. The regulated community, industry and municipalities should support that proposed change.

Wastewater discharge is governed by the federal Clean Water Act (CWA). Adopted in 1972, the CWA says "no one has the right to pollute," and persons who discharge pol-

lutants to surface waters must get a permit from EPA. Under the CWA, industrial and municipal wastewater treatment plants and stormwater systems that discharge to surface waters must have a National Pollutant Discharge Elimination System (NPDES) permit. The NPDES permit sets what pol-

lutants to surface waters must get a permit from EPA. Under the CWA, industrial and municipal wastewater treatment plants and stormwater systems that discharge to surface waters must have a National Pollutant Discharge Elimination System (NPDES) permit. The NPDES permit sets what pol-

MassDEP tentatively projects an annual assessment fee of about \$2 per year for a household of four.

lutants, and at what quantities and concentrations, may be discharged to surface waters based on established technology-based standards or more stringent requirements to achieve state-established water quality standards in the receiving waters.

While Massachusetts has a number of regulatory programs designed to protect water quality that are run by MassDEP, EPA is the lead agency for issuing NPDES permits. For the great majority of states, that is not the case. Forty-six states run their own programs, having been authorized by EPA to do so. The other non-delegated states are New Hampshire, Idaho and New Mexico.

It is not that Massachusetts has sought to be in the minority. Since 1972, it has considered taking delegation of the NPDES program several times, the latest in 1996-1997. At that time, a commissioned study concluded a shift of the NPDES program

report, MassDEP thoughtfully set out pros and cons and the steps needed for Massachusetts to take delegation of the NPDES program from EPA. The Baker-Polito Administration, through the Executive Office of Energy and Environmental Affairs and MassDEP, has now moved the NPDES delegation issue to the front burner and MassDEP is charting a course to assume responsibility for the NPDES program.

#### Municipalities Bear The (Minimal) Cost

What are the advantages to assuming responsibility for the NPDES program? As MassDEP's 2013 report noted, MassDEP is better equipped than EPA to focus on Massachusetts-specific issues and develop a more thorough scientific understanding of local conditions. Massachusetts already has water-related permitting activity under the Massachusetts Law. By having one permitting authority, and with EPA limited to an

Reprinted with permission of Banker & Tradesman.

This document may constitute advertising under the rules of the Supreme Judicial Court of Massachusetts.

oversight role, permitting would become a more efficient process. Most importantly, MassDEP is best suited to work with municipalities and industry to collaborate on permit conditions, based on the best available science, to increase efficiency and limit the risks for costly permit appeals. Finally, with attention to robust integrated water planning activities, NPDES delegation could result in significant, and earlier, improvements to water quality.

Running the NPDES program, however, does not come without cost. It is anticipated that those costs would be borne by taxpayers, NPDES permit holders and ratepayers, thereby further burdening local communities. A fee based on wastewater discharge flow, as well as application and annual compliance fees, may

together provide a stable financial foundation for a state-run program. While municipalities may balk at new fees, the benefits outweigh the cost burden. MassDEP currently estimates a delegated NPDES program would have annual costs of about \$10 million. To put that number in perspective, Gov. Charlie Baker's proposed budget for fiscal year 2017 is \$39.6 billion, and for environmental agencies, \$215 million. MassDEP tentatively projects an annual assessment fee of about \$2 per year for a household of four.

While Massachusetts may be coming late to the NPDES delegation game, MassDEP is well-positioned to develop a strong NPDES program. MassDEP can learn from other states that have recently taken delegation to develop streamlined

and efficient programs. This is what MassDEP is presently doing: examining how other states have done it so that Massachusetts can run a best-in-the-nation NPDES program here.

After 40 years, it is time for Massachusetts to catch up to other states by folding the NPDES program into other MassDEP-run water programs. Ratepayers, municipalities and industry should urge the Baker-Polito Administration and MassDEP to make a swift transition and assume NPDES program authorization from EPA. ■

---

*Robert D. Cox Jr is an environmental attorney with Bowditch & Dewey LLP, and serves on MassDEP's NPDES Advisory Committee. He may be reached at rcox@bowditch.com.*