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Massachusetts Considering Taking Control of Clean Water Permitting

Summary: *Massachusetts Governor Charlie Baker's administration is considering a move that would place Clean Water Act permitting in the hands of the Massachusetts Department of Environmental Protection (MassDEP). Massachusetts is one of only four states in which the U.S. Environmental Protection Agency (EPA) directly manages that state's Clean Water Act programs, including the permitting system known as the National Pollution Discharge Elimination System (NPDES). But according to [recent reports](#), that may change.*

Under a process known as "delegation," states may assume Clean Water Act responsibility for state water bodies, and all but Massachusetts, New Hampshire, Idaho, and New Mexico have applied for delegation and been approved by EPA. In the absence of delegation, EPA manages the Clean Water Act and NPDES program in those states, which often overlap and may duplicate separate state law requirements.

The potential takeover by Massachusetts was last explored in 2012, when the Massachusetts legislature directed MassDEP to evaluate the feasibility, costs, and benefits of delegation in Massachusetts. In 2013, [MassDEP prepared a report](#) for Governor Deval Patrick that identified a range of benefits accruing from delegation, including:

- i. a more Massachusetts-centric focus on regulations;
- ii. streamlining permitting;
- iii. potential improvements in both permitting and water quality; and
- iv. a more integrated planning process.

The 2013 report also identified certain disadvantages of delegation, including:

- i. increased costs on the order of \$7.5–10 million annually and a related risk of funding shortfalls and corresponding permitting backlogs;
- ii. a risk of political pressure weakening permits and water quality in the state;
- iii. the need for MassDEP to develop internal capacity and expertise to manage the program; and
- iv. a limited ability to "hand back" the program to EPA once delegated.

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The Patrick Administration ultimately opted to not pursue delegation.

Despite recent budget cuts at MassDEP culminating in the loss of 100 MassDEP employees just last year, the Baker Administration has taken initial steps towards Clean Water Act delegation. Proponents within the administration cite improved permitting processes and lowering the burden imposed on municipalities by storm water requirements. Detractors worry about weaker discharge standards and levels of staffing at MassDEP, which would need to hire as many as 50–100 employees to manage the program. Municipalities are hoping that a program administered by MassDEP would reconsider recently announced Charles River permit requirements that they think are too costly to implement.

Implications

Whatever happens, EPA has the final word. In addition to overseeing the delegation process, EPA also retains oversight after delegation, with the ability to rescind a state's delegation and enforce any requirement of the Clean Water Act on a state, municipality, or private entity.

Delegation could bring a more local focus to Massachusetts regulation under the Clean Water Act, including increased responsiveness to municipal concerns about costs. At the same time, the process could be particularly tricky for the Commonwealth at a time when the Governor is slimming down government rather than staffing it up.

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