COMMENTS OF THE ADVOCATES FOR WETLANDS AND WATERSHEDS

Regarding

PROPOSED REVISIONS TO SEWER CONNECTION AND EXTENSION PERMITTING REGULATIONS AND OTHER RELATED REGULATIONS

Introduction

DEP does not have sufficient data to know the extent to which sewer discharges contribute to nonattainment of Massachusetts Surface Water Quality Standards. Today, only about 5% of the rivers in Massachusetts are known to be in full attainment of state surface water quality standards. While much of the nonattainment is due to historic and nonpoint sources, DEP simply does not have the information available to it to determine the role that industrial or sanitary sewage play in releasing toxic and conventional pollutants into the aquatic environment. The reality is that DEP is only monitoring a tiny percentage of rivers, and where monitoring has taken place, only a small fraction of our water bodies have been found to be fully meeting water quality standards. DEP has never evaluated whether various types of sewer dischargers are introducing pollutants that "pass through" publicly owned sewage treatment facilities (POTWs), a problem which is especially likely to occur at POTWs *without* EPA-certified Industrial Pre-treatment Programs (non-IPPs). Nor has DEP comprehensively evaluated the POTWs themselves. Indeed, as discussed below, there is evidence that some POTWs and other local and regional sewer connection and extension permitting agencies are incapable of replacing the level of regulatory oversight that DEP is now proposing to abdicate.

Under these circumstances it is extraordinary for DEP to propose the virtual elimination of meaningful state oversight of industrial and sanitary sewer dischargers, regardless of the level of toxic or conventional pollutants in their wastewater, and indeed, without even knowing or seeking to ascertain the level of these pollutants in their wastewater.

DEP is proceeding with this regulatory revision in violation of the MEPA filing requirement for "regulatory proposals that significantly reduce standards for environmental protection." We will show below why we think the current proposal reduces existing standards. The Neponset River Watershed Association (NepRWA), the Conservation Law Foundation and the New England Public Employees for Environmental Responsibility (PEER) have formally requested MEPA to issue an Advisory Opinion as to whether DEP must file an ENF before going forward with its regulatory revision. We therefore ask DEP to withdraw these proposed regulations until they can be reviewed under MEPA and rewritten so as not to reduce current regulatory standards for environmental protection.

Our recommendations respond to the need to streamline DEP's permitting process, both to eliminate permitting for those sewer dischargers that can be demonstrated to pose no significant risk to the aquatic environment as well as to eliminate duplicative permitting where local agencies can show they are doing an adequate job. Our proposals for achieving this goal in a reasonable manner are presented at the end of these comments.

The Proposed Revisions Represent a Significant Reduction in Standards for Environmental Protection

Existing Regulations. Currently, most sanitary sewer discharges, all industrial sewer discharges, and all sewer extensions (new sewer mains) are required by regulation (314 CMR 7.00) to obtain individual permits from DEP which contain strict and often individualized environmental protection standards and conditions. 314 CMR 7.10(2) states that DEP in reviewing all sewer connection and extension permit applications "*shall establish special conditions, as required on a case-by-case basis* … These conditions may establish effluent limitations … pretreatment requirements … monitoring, recordkeeping and reporting requirements and other conditions when in [DEP's] opinion said special conditions are necessary to assure that the discharge does not have a deleterious effect upon the treatment works, processes, equipment, or receiving waters and that the project does not pose a threat to public health or the environment …." (*Emphasis added*.) Furthermore, permits that are granted must be for a limited duration, giving DEP the opportunity to add new conditions as necessary to address changed circumstances.

Proposed Regulations. In place of the existing regulation DEP is proposing to require a permit application only from sewer connection projects which discharge over 50,000 gallons per day (gpd), and then only if those discharges represent more than 5% of the flow going to a publicly owned sewage treatment plant (POTW). A permit application would also be required of sewer extensions of 1,000 feet or greater. However, these permits would be granted automatically if DEP failed to act on the application within 45 days. Other dischargers would either be totally exempt, be required to comply only with "general permit" conditions, or be made to do a one-time certification of compliance with general regulatory standards (certifications would be presumptively approved if DEP did not act on them within 60 days and projects proceeding under general permits, of course, don't need DEP approval at all). ***In extremely few cases would DEP establish individualized effluent limits or pretreatment requirements, as current regulations require for all permits when necessary to protect the environment.***

Elimination of Most State Permitting Also Makes Enforcement More Difficult. Despite a general regulatory prohibition in 314 CMR 7.00 on the introduction of pollutants into the sewer system that can pass through a POTW untreated, such pollutants do sometimes pass through. It is difficult if not impossible to trace such a pollutant in surface water back to its source, particularly if the source has no permitting history identifying this pollutant as being in its waste

stream. Without this ability, it is impossible to take enforcement action requiring the discharger to clean up or otherwise mitigate the impacts of the pollution through enforcement action.

Local Regulation and Federal Oversight are Not Always Adequate

Some Local Sewage Treatment Plants are Exceeding their Federal Discharge Limits and Violating other State and Federal Mandates. The Department premises its proposed regulatory revisions primarily on that fact that all sewer discharges end up in local or regional publicly owned sewage treatment plants ("POTWs) which then treat the sewage before discharging it into surface waters. POTWs are subject to conditions contained in their federal "NPDES" surface water discharge permits that limit the concentration of certain pollutants that they may discharge. In order to meet their discharge limits, POTWs clearly have an incentive to make their sewer users limit the amounts of these pollutants in their wastewater. Despite this incentive, however, many POTWs at least occasionally exceed their NPDES limits.

NPDES permits set standards only for a limited number of pollutants, and the POTW need only test its effluent for those pollutants[1], although it is true that many POTWs do more than is required. Thus, if a new industry ties into the sewer, or an existing industry adds to its flow or changes the industrial chemicals in its wastewater, it may be adding dangerous levels of new pollutants for which the NPDES permit sets no limits. Or pollutants such as toxic heavy metals can end up in sewage sludge, posing serious environmental risks regardless of whether landfilled or incinerated. Transferring water pollutants to land or air runs against the very principle underlying the establishment of DEP's Bureau of Waste Prevention.

POTWs Required to Permit only Some Industrial Dischargers. Those POTWs with EPA-approved "Industrial Pretreatment Programs (IPPs) are only required by EPA to issue permits to "Significant Industrial Users" (SIUs), i.e., those with flows of 25,000 gallons per day (gpd) or more; those whose discharges represent 5% or more of the wastewater going to the POTW; and a limited list of industrial categories whose wastewater contains a limited list of contaminants for which EPA has set standards (albeit, generally very weak standards). POTWs with IPPs may (and often do) permit some other industrial dischargers, but this is not mandatory. Those POTWs with no EPA-certified IPPs (called non-IPPs) are not required by state or federal law or regulation to permit *any* industrial user, and only those subject to the limited list of EPA wastewater standards even have to report their discharges to EPA.

EPA has insufficient staff to adequately oversee POTWs or their industrial sewer dischargers. EPA has approximately 2 people (i.e., 2 "full time equivalents") overseeing all the POTWs in all of New England. EPA has not designated a new IPP since 1998. Since that date,

[1] While all POTWs must conduct an occasional "wet test" on their effluent, this test is only useful for identifying contaminants so powerful and so concentrated that they have an almost immediate lethal impact on the test species, usually a type of shrimp. This test is useless for identifying pollutants that bioaccumulate over time or that pass through the POTW intermittently in "slugs" and are not in the wastewater on the day the wet test occurs.

a number of "Significant Industrial Users" (SIUs) have tied into non-IPPs that would have been required to obtain a local permit if DEP had designated these POTWs as IPPs.

DEP's proposed sanitary sewer connection and sewer extension thresholds also incorrectly assume adequate local permitting. It is almost always the municipal sewer authority, and not the POTW, that grants sanitary connection and sewer extension permits, and they don't always communicate very well, if at all, with their POTWs. This can be a particular problem for regional POTWs with sewers in more than one town. In addition, local sewer departments are much less likely than the state to be able to withstand the political pressure that sometimes accompanies the desire to bring a large new employer to a municipality. Thus local permits are sometimes issued that strain or even overwhelm POTW operations, and in some cases state permitting is the only way to avoid these impacts.

The Department's proposed state permitting thresholds for sanitary connections and sewer extensions are either too high or are not the appropriate measurement to prevent overtaxing POTWs. For example, depending on the density of a development, a sewer extension of less than 1,000 feet may or may not contribute a significant volume of wastewater to the POTW. Therefore, state permitting of sewer extensions should *also* be triggered by the same thresholds that apply to sewer connections. And it is not the percentage of POTW capacity that is important, it is the percentage of the POTW's remaining capacity; if a POTW is already operating at 96% of capacity, a connection or extension adding an additional 4.9% would overwhelm it. Finally, the regulations should, at a minimum, require a state permit if the amount of sewage exceeds a specific size threshold or (not "and") if it represents more than a specified percentage of the POTWs remaining capacity. A 249,000 gpd discharge is less than 5% of the capacity of a 5 mgd POTW, but it is still a very large discharge which the state should review.

Current regulations already provide DEP with the power to stop issuing connection and extension permits when a POTW can handle the job itself, yet DEP has not done so. Under 314 CMR 7.16, DEP may at its discretion delegate permitting to "any public entity controlling a publicly owned treatment works" it finds that it has the ability to "ensure that existing levels of environmental protection are maintained or enhanced." This delegation authority, in fact, is specifically given to DEP by the MA Clean Water Act, M.G.L. c. 21 sec. 43(8). While only the MWRA has received section 43(8) delegation, we believe that DEP should adopt standards for delegation and evaluate the abilities of other POTWs. This would be a far better alternative than the wholesale elimination of state permitting of dischargers to all POTWs.

The Department's own staff has found that some POTWs are not doing an adequate job. Far from making a reasoned evaluation based on hard evidence, DEP either doesn't know which POTWs and local sewer departments are performing adequately or, in some instances, DEP staff has concluded that some are not. For example:

- DEP staff with extensive POTW experience concluded that in many cases POTW laboratories are incapable of accurately determining the concentration of pollutants in their effluent and thus whether they are truly in compliance with their NPDES limits.

- Pilot testing in all four DEP regions of a draft POTW evaluation methodology showed that even those POTWs which Department staff had previously rated as doing an excellent job were failing to meet significant state and federal regulatory mandates. This included at least one POTW with an EPA-certified Industrial Pretreatment Program (IPP).

- DEP experience has shown that a large number of town sewer departments are incapable of doing basic sewer connection permit evaluations, especially when connections require pump stations.

The Regulatory Revisions would Largely Eliminate Public Notice, Comment, Access and Right to Appeal for an Adjudicatory Hearing

We very strongly object if the Department is trying to eliminate public participation regarding projects that currently require permits but would, under the proposed revisions, be covered by a permit by rule, a certification, and/or a presumptively approved permit. Few municipalities provide opportunities for public participation, so elimination by the Department of so many state sewer connection and extension permits would have the effect of leaving the public entirely out of these often important decisions. It would also, of course, eliminate the right to appeal for an adjudicatory hearing.

The proposed regulations define "permit" as "an authorization issued pursuant to (the state Clean Waters Act) M.G.L. c. 21 Section 43 and 314 CMR 2.00 and 3.00, 5.00 or 7.00." Since the proposed revisions to 314 CMR 7.00 include authorizations by rule, certification and presumptive approval, it may be that the Department intends to make them subject to the permitting procedures established by 314 CMR 2.00. However, none of these so-called "permits" appear, by their very nature, to be consistent with the procedures established under 314 CMR 2.00, which require tentative determinations by DEP of approval or disapproval, public notice (including newspaper notice and a public comment period), as well as the possibility of a public hearing.

The Proposed Regulations an Abuse of Discretion and a Violation of the State Clean Waters Act

We believe that the revisions which DEP is proposing represent not only an abuse of its regulatory discretion but will also result in a violation of the state Clean Waters Act. Although the Clean Waters Act gives the Department the authority to grant exemptions from permitting, the wholesale exemptions that it now seeks fly in the face of Act's requirement that direct and indirect surface water discharges "conform to … receiving water standards" and that the Department act "to safeguard the quality of the receiving waters" and ensure compliance "with pertinent provisions of the laws of the commonwealth or of federal law."

Recommendations for Streamlining Permitting Without Reducing Environmental Protection Standards

We believe that instead of pursuing its present course, DEP should do the following:

1. Seek *more funding* from the Administration and the Legislature, both for sewer permitting and enforcement as well as for monitoring and gathering of the other information DEP needs to identify those sewer users that should be exempt from state permitting. The undersigned organizations would strongly support this additional appropriation.

2. Exercise use of its current regulatory authority to *delegate* state permitting to any POTW that demonstrates its ability to adequately regulate its sewer users. This should not be done, however, until the Department has done a thorough, individual analysis of the capability of each POTW. Current regulations on delegation should be amended to authorize delegation of sewer extension and connection permitting to sewer departments or other appropriate local or regional agencies the do not "control" a POTW and to require that delegation be for a finite period, subject to renewal based on reinspection by DEP.

3. Evaluate *which* industrial categories (*standard industrial codes*) should be allowed to substitute certification for permitting, just as the Department did before it allowed photo processors, dry cleaners, etc. to *certify*. Certification, however, should be done periodically and not just once as the Department is proposing and it should not be subject to presumptive approval. "Industrial waste" is defined in 314 CMR 7.02 as waste "resulting from any process of industry, manufacturing, trade or business." It is possible that the sewer discharges of some trades and businesses do not represent a significant threat to surface water. For example, many trades and businesses are allowed to use septic systems under Title 5 (see 310 CMR 15.004 (5)& (6)), so the Department has, apparently, already made a determination that their discharges do not pose a threat to groundwater. It may be legitimate to exempt some of these businesses from even certifying.

4. Eliminate presumptive approvals, particularly for those required to apply for permits.

5. Unless exempted in accordance with #s 2 and 3, above, require state permits for, at a minimum, all *industrial* sewer users that do not have local permits (especially in non-IPPs), unless the local permitting agency can demonstrate a legitimate reason why this category of sewer user is exempted. In addition, industrial dischargers with local permits should have to get a state permit if the local permit does not establish a discharge limit for every "significant" pollutant in their waste stream. Significant pollutants might include those which could reasonably be

expected to cause or contribute to either a violation of state surface water quality standard or an exceedance of 21E reporting requirements.

6. Require permits for sewer extensions above a certain gpd capacity. The length of a sewer extension is not always a legitimate measurement of the amount of new pollutants that it can add to the sewers. The percentage-of-POTW-capacity threshold that applies to connections should also apply to extensions.

7. Require a state permit if the amount of sewage exceeds a specific size threshold or (not "and") if it represents more than a specified percentage of the POTWs remaining capacity. A 249,000 gpd discharge is less than 5% of the capacity of a 5 mgd POTW, but it is still a very large discharge which the state should review. Furthermore, it is not the percentage of POTW capacity that is important, it is the percentage of the POTW's remaining capacity. If a POTW is already operating at 96% of capacity, a connection or extension adding an additional 4.9% would overwhelm it.

8. At a minimum, retain state permitting for sanitary sewer connections with pump stations (other than single family homes) unless DEP has delegated permitting to a local authority.

9. Clarify that the public review procedures of 314 CMR 2.00 apply to sewer permits and revise proposed 314 CMR 7.00 permitting rules to conform with the former regulations.

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