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October 12, 2017

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Joint Committee on Environment, Natural Resources and Agriculture
State House Room 513
Boston, MA 02133

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

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Re: Support: H. 2139, an Act to improve water quality and pollution control programs
Opposed: H. 2777, an Act to Enable the Commonwealth's administration of the
Massachusetts Pollutant Discharge Elimination System

Don Burn
Westborough

Dear Chairwoman Gobi, Chairman Pignatelli, and Committee members,

Robert Donelan
Concord

Paul Goldman
Marlborough

Martin Moran
Hudson

Pam Rockwell
Concord

Laura Rome
Maynard

Peter Shanahan
Acton

Thank you for the opportunity to submit testimony on two bills that would have major impacts on the Commonwealth's water resources – H. 2139 and H.2777. Both of these bills address the same question, but in two very different ways. The question is how best to use the resources of the federal Environmental Protection Agency (EPA) and the Massachusetts Department of Environmental Protection (MassDEP) to implement a permit program required by the federal Clean Water Act that protects our state's surface waters from harmful pollution. These permits are known as National Pollutant Discharge Elimination System (NPDES) permits. Whenever a municipality, industry, or other entity wishes to discharge pollutants to a surface water of the United States, they must first obtain a NPDES permit. These permits protect the surface waters by limiting the quantities of pollutants to be discharged and imposing monitoring requirements and other conditions to enable the health of the waters and their uses—boating, fishing, wildlife, scenery, drinking, swimming—to be restored.

Lisa Vernegaard
Maynard

OARS is the watershed organization for the Assabet, Sudbury and Concord Rivers, which run for 533 river miles from Westborough to Lowell. We have 725 members and have conducted a water quality monitoring program for 24 years. As Executive Director of OARS, I was appointed by MassDEP to serve on its NPDES Delegation Advisory Committees of 2013 and 2016 which assessed the pros and cons of the EPA delegating the NPDES program to the state.

In my 12 years working for OARS, I have spent a significant amount of my time reviewing, commenting on, and appealing the NPDES permits issued to allow discharges of wastewater to our rivers. In Massachusetts, EPA Region 1 has been the lead permitting authority since the current version of the federal Clean Water Act took effect in 1972. While the Clean Water Act allows a state to be delegated this permitting authority with EPA's permission and upon meeting certain requirements, Massachusetts has been happy to allow EPA to run (and pay for) the NPDES permitting program in our state for more than 40 years. It should be noted, however, that EPA seeks the views of MassDEP regarding the terms to be included in NPDES permits to ensure compliance, as required, with the Massachusetts Surface Water Quality Standards and to allow MassDEP to meet its duty under state law to issue a discharge permit under the state's own Clean Waters Act. The NPDES permits are jointly issued by EPA and MassDEP.

I have tremendous respect for the professionals at both EPA Region 1 and MassDEP and the missions of both agencies. In my experience, having the two agencies working together to administer the Clean Water Act has greatly benefitted our water resources and serves the Commonwealth's interests.

That said, we all recognize that there are challenges in the efforts to protect our water. Due to having inadequate resources, MassDEP has been unable to provide the scientific data, the analysis, or the enforcement that is needed to protect and improve the Commonwealth's waters in this time of rapid development, expansion of pollution from impervious cover, and increasing impacts of climate disruption on water quality. I gave specific examples of these problems in my testimony last year.

Today I will focus on OARS' first-hand experience with permitting and appeals under the NPDES program. In 2005, regulated municipalities were issued NPDES permits to discharge treated wastewater into the highly polluted Assabet River, formerly known as "The Cesspool of Massachusetts." After negotiations between the municipalities and OARS managed by EPA Region 1, the EPA/MassDEP permits that went into effect complied with DEP's pollutant load allocation, as required by law. Our subsequent appeal of a permit modification in 2009 that would have allowed more wastewater to be discharged into the same river despite viable alternatives was heard by the EPA's Environmental Appeals Board (EAB), and the modification was withdrawn. By 2017, the Assabet River has become so much cleaner that it has become a major recreational resource, with substantial economic, quality of life, and environmental benefits. Residents can see it with their own eyes, and our water quality data corroborate it. This is why we believe that the current NPDES permit system generally works quite well. The permits that are issued by EPA Region 1, after consultation with MassDEP, are generally strongly protective of our surface waters.

As noted above, however, OARS sometimes finds that a NPDES permit term or condition does not meet the requirements of the Clean Water Act or EPA's own regulations. Under the current system, administrative appeals of NPDES permits are heard by an independent panel of administrative law judges at the EAB in Washington who are highly trained and experienced in environmental law. The EPA Administrator has delegated his/her authority to make final administrative appeal decisions to the EAB, so the Administrator

(a political appointee) plays no role in deciding administrative appeals, even in controversial cases that may have political implications. If there were to be delegation to the state, however, administrative appeals of NPDES permits would be heard internally by MassDEP—the same agency that issued the permit—and the final decision would be made by the MassDEP Commissioner (appointed by the Governor). Although an aggrieved party can seek judicial review of the Commissioner’s final decision in an administrative appeal, the court can only review the administrative record, cannot take testimony, and historically defers to the regulator—in this case MassDEP. As a result of these differences in administrative appeals at the federal and state levels, MassDEP’s administrative appeal process, as currently structured, fails to meet the high standards of fairness and objectivity that are built into the EPA process.

This is significant for stakeholders because the administrative appeals process at EPA is how stakeholders may challenge deficiencies in NPDES permits. Under MassDEP’s current rules, it would be much more difficult for third parties to administratively appeal permit provisions. MassDEP requires that any individual seeking to appeal must be an “aggrieved person,” a legal standard that is not easy to meet. Unless MassDEP modifies its rules regarding administrative appeals to parallel those now in place at EPA, and to insulate decision-making from political pressure, we cannot support this process. It is clear to us that the appeals process under delegation would make the regulator also the judge and jury, and afford less access to stakeholders who could be impacted. One might ask, why are all those testifying in favor of delegation regulated permittees? In contrast, those opposed are the local residents and other stakeholders who are impacted by the decisions, and who have no vested interests except in good governance and a healthy environment.

Last year Governor Baker proposed that the EPA delegate the NPDES system to MassDEP. House 2777 is the same proposal, with no changes. We oppose that bill. Our response is to “Fix it First”—enable MassDEP to meet its mission *whether or not* the NPDES program is delegated to the Commonwealth. House 2139 would do exactly that.

House 2139, an Act to improve water quality and pollution control programs, takes the tried and true approach of identifying the problem, finding out the causes, and proposing how to fix it. It uses a well-established entity, the state’s own Water Resources Commission, to take a holistic view of MassDEP’s mandate, and examine what are the most effective ways to meet that mandate. This will take into consideration other important state initiatives, such as in drinking water and wastewater infrastructure financing, and other water resource laws, regulations and policies.

The two previous NPDES Delegation Advisory Committees, on which I served, looked only at the narrow choice of delegation or no delegation. In contrast, this Bill will allow a well-considered complementarity and synergy among the many state initiatives and rules affecting water pollution. There is widespread agreement on all sides that it makes sense to consider water resource permitting holistically, and that

MassDEP needs sufficient funding to meet its obligations under the Clean Water Act. This bill has both those objectives as its goal.

House 2139 requires a final report with specific recommendations for legislation, funding, or administrative changes within 12 months of the first meeting. That is just a *one-year pause* to enable the Commonwealth to identify the most cost-effective way to meet the goals of the Clean Water Act and determine how to sustainably fund it. That is a small price to pay to do it right.

OARS strongly opposes H. 2777. We strongly support H. 2139 and respectfully ask the Committee for a Favorable Report.

Thank you.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'A. Juma', with a long, sweeping underline that extends to the left and then curves back under the name.

Alison Field-Juma
Executive Director