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STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

ANGUS S. KING, JR.
GOVERNOR

MARTHA KIRKPATRICK
COMMISSIONER

December 29, 2000

Senator John L. Martin, Chair
Representative Scott W. Cowger, Chair
Joint Standing Committee on Natural Resources
120th Maine Legislature
State House Room 437
Augusta, Maine 04333

RE: Report to the Joint Standing Committee on Natural Resources Regarding the Maine Department of Environmental Protection's Assumption of the National Pollutant Discharge Elimination System Under the Federal Clean Water Act

Dear Senator Martin, Representative Cowger and members of the committee,

This report is submitted pursuant to section B-10 of PL 1997 Chapter 794, entitled, "An Act to Facilitate Delegation of the Federal Waste Discharge Permitting Program". That Act set the legal foundation for the State of Maine to apply to the US Environmental Protection Agency for authorization to administer the National Pollutant Discharge Elimination System (NPDES) under the Federal Clean Water Act. The Act had three major components. First, it included a series of statutory changes to assure that Maine law is consistent with the Clean Water Act as required for a state administering the NPDES program. Second, the Act authorized the addition of eight new staff positions at DEP both to address long-standing staffing deficiencies in the DEP's water program and to support expanded responsibilities of the NPDES program. Finally, the Act instituted a new wastewater discharge fee system to provide adequate funding for administering the program.

Background. Forty-two states currently have NPDES authorization; most were delegated many years ago. Delegation gives a state the primary authority for most Clean Water Act functions, including the issuance of discharge permits. Without delegation there is dual permitting, one action by the state with another nearly identical permit issued by EPA. Eliminating this redundancy has long been favored by many interests in Maine. Receiving NPDES authorization will create a 'one-stop permitting' system, give the State more accountability in managing its own waters, and provide for more efficient program management at DEP.

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In all delegated states, EPA retains review and oversight authorities to ensure that state actions meet uniform minimum standards nation-wide.

Chapter 794 was enacted in April 1998. With that as a foundation, DEP was able to develop a complete application for NPDES authorization. A complete application contains five major elements:

- 1.) A Program Description explaining in narrative form how the state intends to staff, fund and operate an authorized NPDES program;
- 2.) State rules and laws that parallel federal regulations for the NPDES program. As part of the process to prepare Maine's application, DEP developed a set of rules that will become effective upon EPA's approval of the program. These rules were adopted by the Board of Environmental Protection in March 1999;
- 3.) A Memorandum of Agreement between DEP and EPA describing the program responsibilities of each agency. The Agreement lays out procedures each agency will follow once the NPDES program is delegated to Maine. It also addresses specific issues that are not covered elsewhere in state or federal regulations;
- 4.) An Attorney General's statement providing assurance that the State's laws and rules are consistent with the Clean Water Act; and
- 5.) A formal letter of application from the governor.

Recent events. In the process of developing the application, the Department worked closely with EPA Region I staff in Boston to assure that the formal application would meet all of the criteria required for approval. This process was collaborative but turned out to be more time-consuming than first anticipated. The formal application was submitted to EPA in Boston in November 1999, and was accepted as complete by the Agency on December 17, 1999. The Clean Water Act requires that EPA make a decision on applications for delegation within 90 days although this time can be extended with the agreement of the state. Accordingly, the decision on Maine's application should have been made by March 16, 2000. Following is a brief chronology of significant milestones in EPA's processing of Maine's application.

December 17, 1999	Maine's application was found to be complete.
January 16, 2000	EPA conducted a public hearing in Augusta.
February 29, 2000	The deadline for submission of written comments to EPA.
March 16, 2000	The original date required for EPA to make a decision; extension to 5/16/00 granted by the State.
May 16, 2000	The US Department of the Interior submits to EPA its position on Indian tribal jurisdiction issues in Maine.

May 16, 2000	Expiration of the first extended date for EPA's decision; extension to 6/15/00 granted by the State.
June 15, 2000	Expiration of the second extended date for EPA's decision; extension to 7/26/00 granted by the State.
June 28, 2000	EPA publishes a notice reopening the public comment period until July 28, 2000, to receive additional information on Indian tribal jurisdiction issues.
August 4, 2000	EPA publishes a notice further extending the comment period until August 21, 2000, for information on Indian tribal jurisdiction issues.
September 26, 2000	Expiration of the extended time period for EPA's decision; no further extensions granted by the State.

Current Status and Pending Issues. As of mid-December 2000, EPA has not made a decision on Maine's application, although the Department is hopeful that a decision will be made without additional delay. Since the deadline for making a decision on the State's application has not been extended beyond September 26, 2000, EPA has taken the position that it is prohibited from issuing any more NPDES permits in Maine until the Agency does make a decision. Two issues have received much of the attention in EPA's review: delegation of the program for areas claimed to be under the sovereign control of Indian tribes in Maine, and the impact of listing the Atlantic Salmon as an endangered species.

Tribal jurisdiction has been a long-standing and difficult issue in Maine, and the NPDES delegation has become a high profile venue for the ongoing debate. In May, the US Department of the Interior advised EPA that discharges to waters within or adjoining tribal lands are an "internal tribal matter" and, accordingly, regulatory authority should not be delegated to the State. As a result, EPA would have to retain permitting authority for such discharges. Neither the Department of the Interior nor EPA has made a firm determination of the final scope of the areas that may be subject to this opinion.

In anticipation of the listing of Atlantic Salmon as an endangered species, EPA has been consulting with the National Marine Fisheries Service and the US Fish and Wildlife Service. In order to support EPA's decision, these Services must provide EPA with a biological opinion on the impact of delegation on designated and existing uses of the State's waters, including as a habitat for fish and other aquatic species. EPA has provided these Services with a letter dated December 4, 2000, describing how it will review permitting of aquaculture and fish hatchery activities in Maine, either through its oversight of the State's activities or by exercising its own direct permitting authority if EPA objects to a proposed state permit.

DEP Actions in Preparations for Delegation. Despite EPA's delays in taking final action on the State's application, DEP has proceeded with preparations to strengthen its water program, particularly in the area of permitting. These improvements not only will position the Department to assume the NPDES program as expeditiously as possible once granted, but they will also serve to address historic problems with backlogged licenses.

A major improvement has involved staffing. Waste discharge license fees collected by DEP go into a dedicated account used for the wastewater discharge program. In all, there are 10 positions authorized for the portion of the program funded by fees. Of these, 2 have existed for many years. The other 8 were authorized by Chapter 794 to support the NPDES program and to generally improve the service the DEP is able to provide. Currently, 7 of the 10 positions are filled. Two of these are clerical positions, one supporting the licensing unit and the other doing data processing functions. One professional position is a compliance inspector. The remaining four filled professional positions, including three newly created ones, are in the licensing unit of the program. For some time, the DEP has recognized its water licensing program has been understaffed, and the resulting backlog in license issuances and renewals is unacceptable. However, I am pleased to report that as a direct result of these staffing investments, during the calendar year 2000, we reduced the backlog of wastewater license issuances and renewals by more than 50%. With the new staff now in place, the goal is to have current licenses for all sources by the end of 2002.

Procedures have also been improved. In the fall of 2000, ten staff whose primary function is facility inspection and compliance evaluation were transferred administratively within the Bureau of Land and Water Quality. This was done to join them directly with other staff who provide more detailed technical assistance and pollution prevention programs for wastewater treatment facilities. This shift will consolidate similar activities under a single supervisory structure and should result in improved coordination and efficiency. On the licensing side, new procedures have been implemented for improved scheduling and coordination of license renewals, inspections and water quality studies. Updated standard procedures for licensing and inspections functions have been prepared, and a new database has been developed to track compliance activities has been developed.

Paralleling these changes, the water program has begun conducting performance audits as a means of improving internal management systems and the performance of permitted discharge sources. These audits are generally conducted as a precursor to the renewal of discharge permits. They will also be used as a means of obtaining feedback from the discharge sources regarding the Department's water program and opportunities for improvements.

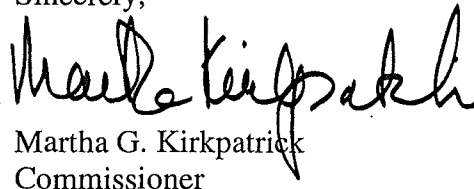
Program Funding and Fees. The wastewater discharge program has a total of 28 positions, handling administration, licensing, compliance, enforcement, water quality assessment, data management and clerical functions. It has three funding sources: the State's General Fund, federal grants, and fees. The portion of the program funded by fees is about one third of the total program cost. In mid 1999, the Department began sending out annual waste discharge fee bills as required by Chapter 794. A second round of annual bills for the year 2000

was sent out in November-December 2000. The revenue generated has been used to maintain existing staff and functions and has allowed the hiring of new licensing staff.

Fees paid in 1999 have been used to pay for the positions described above. The year 2000 fees will be used to continue the program and to allow hiring of the other three new staff positions. Some money already collected from fees but unspent because of delays in EPA reaching a decision on delegation will be held in reserve. This reserve, estimated to be sufficient to cover 6 to 7 months of program operating expenses at full staffing by the end of FY 2001, is important to the future financial security of the program and will be carried over to cover projected cost increases. Based on current projections, the program will remain "in the black" through the State's 2003 fiscal year ending in June 2003.

Next Steps. Depending on EPA's final decision, either the State, Indian Tribes or other interest groups will likely challenge the Agency's decision in Federal Court. While the scope of such a challenge may be limited to only certain geographic areas of the state or to particular issues, the final resolution of NPDES in Maine may not be fully resolved for some time. However, the Department anticipates moving forward, preparing to implement the authorized NPDES program by adding the final staff positions and assuming the primary regulatory responsibility for all elements. In addition to continuing of the traditional permitting, compliance, water quality assessment and related support functions, the Department will add new program elements for industrial pretreatment and storm water as the transition progresses.

Sincerely,

A handwritten signature in black ink, appearing to read "Martha G. Kirkpatrick". The signature is written in a cursive, flowing style with some loops and flourishes.

Martha G. Kirkpatrick
Commissioner