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RE: Comments on Draft Permit No. MA0103284 for the MWRA Deer Island Treatment Plant

Dear Ms. Barden and Ms. Golden:

The Massachusetts Water Resources Authority Advisory Board (the Advisory Board or the Board) appreciates the opportunity to comment on the draft National Pollutant Discharge Elimination System (NPDES) Permit No. MA0103284 (the Draft Permit) for the Massachusetts Water Resources Authority (MWRA) Deer Island Treatment Plant (DITP). The U.S. Environmental Protection Agency – Region 1 (EPA or the Region) noticed the Draft Permit for comment on May 31, 2023. That same day, the Massachusetts Department of Environmental Protection (MassDEP) also issued a 2023 Draft Massachusetts Permit to Discharge Pollutants to Surface Waters for DITP (the State Permit) that incorporates by reference Parts I.A-K and Part II of the Draft Permit. This letter similarly comments on the State Permit.

The Advisory Board, formed by the same legislation that created MWRA, represents and submits these comments on behalf of the communities served by MWRA.[1] MWRA ratepayers live in those communities and bear the costs associated with operating DITP and MWRA's sewer system. The Draft Permit attempts to regulate four of these communities (Boston (through the Boston Water and Sewer Commission (BWSC))), Cambridge, Chelsea and Somerville) that own and operate combined sewer systems (the CSO-responsible Co-permittees), and thirty-nine communities that own and operate sanitary sewer system (the Co-permittees).[2]

The Advisory Board harbors substantial concerns about how the Draft Permit (and, by extension, the State Permit) would inappropriately regulate DITP and the communities. The Draft Permit relies on generic prohibitions against violating water quality standards that, contrary to law, fail to define how MWRA and the communities must assure the protection of receiving water quality. The inclusion of forty-three communities as co-permittees exceeds EPA's authority in several respects and, in many instances, is inadequately explained in the Fact Sheet. Turning DITP's permit into a quasi-regional general permit for collection systems also creates the risk that the communities could incur liability for conduct for which they are not responsible. Unless EPA and MassDEP clarify the communities' and MWRA's responsibilities, DITP's permit could upset the longstanding and successful relationship among MWRA and the communities.

The Advisory Board also has substantial concerns about the Draft Permit's imposition of novel requirements to develop and implement major storm and flood event plans. These requirements mark a

[1] *See* Acts of 1984 ch. 372, § 23, 1984 Mass. Acts 805.

[2] Those thirty-nine Co-Permittees are listed in pages 1-4 of Appendix B to the Draft Permit and in Appendix B to the State Permit.

momentous change in NPDES permit requirements and have the potential to burden the communities' budgets and capital planning processes. Yet Neither EPA nor MassDEP has provided much of any explanation for these major new programmatic requirements. Moreover, both agencies have failed to explain how they have statutory authority to impose long-term resiliency planning and capital project implementation obligations through this permit.

This failure to identify legal authority is unsurprising because none exists. These planning requirements attempt to regulate facilities and assets untethered to any specific discharge, are inconsistent with the NPDES permit's five-year term and the certainty Congress intended to afford NPDES permittees. In addition, EPA has failed provide permittees and the general public with a cost-benefit analysis of these novel and substantial requirements, which will take far longer than the 12-month deadlines that the Draft Permit gives MWRA and the communities to develop and begin to implement major storm and flood plans. EPA should also assess whether communities' existing planning efforts address or could be adapted to address the issues EPA seeks to remedy through the major storm and flood event planning requirements in the Draft Permit.

Finally, requirements for permittees and co-permittees to develop adaptation plans that have appeared in NPDES permits issued subsequent to issuance of the Draft Permit suffer from many of the same legal infirmities identified above with respect to major storm and flood event planning.

I. The Draft Permit's Generic Prohibitions Against Violating Water Quality Standards Violate the Act and EPA's Regulations.

The Draft Permit's vague, open-ended requirements to meet water quality standards (WQS) without specifying *how* MWRA and the communities are supposed to do so violates the Clean Water Act (CWA or the Act). Rather than prescribe concrete pollutant limits or operational requirements to protect water quality, Parts I.A.2, I.B.2.a, and I.B.2.f (collectively, the Generic Prohibitions) make water quality standards directly enforceable against MWRA and the CSO-responsible Co-Permittees. In doing so, the Generic Prohibitions will force MWRA and the communities to guess about how to meet applicable water quality standards, all while remaining exposed to an after-the-fact enforcement action if EPA or a citizen plaintiff disagrees.

The Act and EPA's regulations do not allow the Region to place MWRA and the communities in this untenable position and the Generic Prohibitions must be removed from the final permit. To the extent that permit terms in addition to technology-based effluent limitations (TBELs) are needed to attain WQS,[3] the CWA demands that NPDES permits set limitations—distinct from the WQS themselves—that the Agency has determined to be adequate to protect WQS. Consistent with the statute, the NPDES permitting regulations require the Region to translate applicable WQS into concrete permit limits rather than make them directly applicable to dischargers. The Generic Prohibitions are also inconsistent with the *Combined Sewer Overflow (CSO) Control Policy*, 59 Fed. Reg. 18688 (Apr. 19, 1994) (the CSO Policy), which specifically requires permit writers to derive permit limits to protect water quality using EPA's regulatory process for translating WQS into

[3] The Advisory Board supports the use of narrative—rather than numerical—TBELs for the CSOs authorized under the Draft Permit as described in MWRA's separate comments.

discharger-specific limitations if limits in addition to TBELs are needed. Retaining the Generic Prohibitions in the final DITP permit would violate these requirements.[4]

A. The Act Does Not Allow EPA to Make Water Quality Standards Directly Enforceable Against MWRA and The Communities.

The Region's inclusion of the Generic Prohibitions in the Draft Permit disregards its obligation under the Act to tell MWRA and the communities *how* they must control their discharges to ensure attainment of WQS. Section 301(b)(1) of the Act requires EPA to set "limitation[s] … necessary to meet water quality standards." This language draws an explicit distinction between "limitations" that EPA may impose in permits and the WQS they protect. The Generic Prohibitions, however, erase this distinction by making whether receiving waters meet WQS the basis for determining whether the Permittee and Co-Permittees are complying with the Permit. The Region may not ignore the Act's directive to protect WQS using concrete "limitations" by making WQS directly enforceable.

To the extent that the Region believes the Generic Prohibitions are necessary to ensure the attainment of WQS, they are also incapable of serving this function and invalid under the CWA. In *NRDC v. EPA*, the Second Circuit invalidated a provision in the Vessel General Permit that—like the Generic Prohibitions—imposed a general duty to meet applicable WQS. 808 F.3d 556, 568 (2d Cir. 2015) (permit required control of discharges "as necessary to meet applicable water quality standards in the receiving water body"). The court found that a general mandate not to violate WQS "is insufficient to give [dischargers] guidance as to what is expected or to allow any permitting authority to determine whether a [discharger] is violating [WQS]." *Id.*at 578. This lack of guidance—a failure to specify pollutants limits or other specific requirements—led the court to conclude that the generic prohibition failed to meet the Act's "requirement that NPDES permits ensure compliance with the CWA." *Id.* at 580. The Generic Prohibitions provide no guidance to MWRA or the communities as to how they must protect WQS, such that they suffer from the same failure to provide direction that was fatal to the Vessel General Permit.

B. The NPDES Permitting Regulations Do Not Allow the Region to Abandon Its Obligation to Set Discharger-Specific Limits Translated from WQS.

By imposing the Generic Prohibitions, EPA also failed to follow its own rules that prescribe only one mechanism for NPDES permits to supplement TBELs to protect water quality standards: setting discharger-specific water quality-based effluent limitations (WQBELs). *See* 40 C.F.R. § 122.44(d)(1)(i)-(vii). Under those regulations, EPA must follow a two-step process for setting limits to protect water quality:

- **First Step**: Determine whether a WQBEL is needed by conducting a reasonable potential analysis. This analysis entails an assessment of whether discharges, taking into account existing permit limits and other sources of pollution, "will cause, have the reasonable potential to cause, or contribute to an

[4] EPA and MassDEP have also failed entirely to explain or justify the Generic Prohibitions' inclusion in the Draft Permit and State Permit, respectively. Neither the Fact Sheet nor the Supplemental Fact Sheet explain the reason for the Generic Prohibitions' inclusion or how either agency possesses authority to impose them. In failing to do so, both agencies violated their obligations to explain the legal and substantive basis for permit terms. *See* 40 C.F.R. § 124.8 (fact sheet must include a summary "of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record."); 314 CMR 2.05(3)(c) (fact sheet must include a "brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions").

excursion above any State water quality standard ….” 40 C.F.R. § 122.44(d)(1)(i). This analysis entails characterization of “both the effluent discharged by the facility … and the receiving water for that discharge,” and often involves modeling or using other analytic methods that must be documented in the record. EPA, *NPDES Permit Writers’ Manual* (*“NPDES Manual”)* pp. 6-12, -30 (Sep. 2010).

- **Second Step**: If reasonable potential exists, the permit writer develops one or more WQBELs for pollutants that could cause WQS exceedances. The regulations direct permit writer to set each WQBEL at a level that is “derived from, and comply with all applicable” WQS. 40 C.F.R. § 122.44(d)(1)(vii)(A). EPA guidance specifies that deriving and setting a WQBEL requires an analysis of data and other relevant information. *See NPDES Manual* p. 6-35.

The CSO Policy, which the Region is obliged to follow in writing the Draft Permit’s provisions addressing combined sewers,[5] makes clear that EPA must follow this process when it sets limits in NPDES permits that regulate CSOs. In writing a Phase II permit like the Draft Permit, the Policy requires the Region to supplement the permit’s TBELs by writing WQBELs “under 40 C.F.R. 122.44(d)(1),” the regulation that requires EPA to conduct a reasonable potential analysis and derive discharger-specific limits. CSO Policy § IV.B.2.c., 59 Fed. Reg. at 18696. The Policy further expects that these limits will be not be open-ended mandates. *See id.*

The region’s proposal of the Generic Prohibitions, however, reflects a failure to follow the CSO Policy’s and regulations’ requirement that they follow these procedures for setting WQBELs if limits beyond the permit’s TBELs are required. The record is devoid of any analysis—or any substantive justification whatsoever—identifying the need for the Generic Prohibitions. The Region conducted no reasonable potential analysis to support these broad prohibitions, nor are they in any way “derived from” applicable WQS. The Region has done no analysis or other work to translate WQS into a discharger-specific limit, which is what EPA’s guidance has long understood deriving a WQBEL to mean. In total, the Region’s inclusion of the Generic Prohibitions reflects a failure to heed its permit writing obligations concerning water quality.

C. The Generic Prohibitions’ Inclusion in the State Permit is Inconsistent with MassDEP’s Regulations.

For these reasons, MassDEP’s incorporation of the Generic Prohibitions in the State Permit violates the regulations for Surface Water Discharge Permits. MassDEP may not issue a permit if its “conditions … do not provide for compliance with the applicable requirements of … the Clean Water Act … and the NPDES regulations at 40 CFR Part 122.” 314 CMR 3.07(1). The Draft Permit, as explained above, runs afoul of the CWA’s and the NPDES regulations’ requirement to protect WQS using only concrete, discharger-specific permit requirements.

The Generic Prohibitions’ inclusion in the State Permit further conflicts with MassDEP’s obligations under its own regulations to the extent that MassDEP believes they are necessary to protect WQS. MassDEP may not issue a permit in instances where “the imposition of conditions cannot ensure compliance with the applicable water quality requirements in all affected States.” 314 CMR 3.07(4); *see also* 314 CMR 3.11(3) (“all permits shall contain limits which are adequate to assure the attainment and maintenance of the water quality

[5] *See* 33 U.S.C. § 1342(q)(1).

standards …."). As explained above and as held by the Second Circuit, the Generic Prohibitions' lack of concrete requirements for protecting water quality make them—per se—incapable of meeting this requirement.

MassDEP also failed to comply with its regulations' requirements for considering site- and discharger-specific information when setting permit limits to protect water quality. The regulations command MassDEP to set permit limits to protect water quality after taking into consideration "natural background conditions, existing discharges, the protection of existing downstream uses, and the attainment and maintenance of beneficial uses in downstream waters." 314 CMR 3.11(3). The Generic Prohibitions circumvent these mandatory analyses by making WQS directly applicable to dischargers. MassDEP cannot rely on these broad, vague provisions to shirk its obligations to set tailored limits that apprise MWRA and the communities of their compliance obligations.

II. Inclusion of Sanitary Sewer Communities as Co-Permittees

For the first time, EPA and MassDEP are attempting to regulate the thirty-nine sanitary sewer communities by subjecting them to regulation under DITP's permit. This radical change to these communities' regulatory obligations exceeds both agencies' authority and, as explained in Section IV below, threatens to disrupt the longstanding relationships between MWRA and the communities it serves. The agencies have also sought to impose this new regime without the communities' consent by unlawfully waiving their permit application requirements.

More troublingly, MassDEP has provided no explanation for its decision to regulate the Co-permittees under the State Permit. The Supplemental Fact Sheet supporting the State Permit provides no justification at all for MassDEP's decision to regulate the sanitary sewer communities as Co-permittees. MassDEP has an obligation to provide a "summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions" in its fact sheets but has provided none for including these Co-Permittees in the State Permit. 314 CMR 2.05(3)(c). In order for the Advisory Board and the communities to have an adequate opportunity to comment on the State Permit, it is critical that MassDEP explain its reasons for this major action and open a new comment period.

A. The Agencies' Lack of Jurisdiction to Regulate the Communities

1. The Federal Draft Permit

The Draft Permit's inclusion of the sanitary sewer communities as Co-permittees exceeds the Region's jurisdiction. The Act and case law limit EPA's authority under the NPDES program to regulating "the discharge of [a] pollutant." 33 U.S.C. § 1311(a). In the absence of such a discharge, these communities are "neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit." *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 504 (2d Cir. 2005); *Nat'l Pork Producers Council v. EPA*, 635 F.2d 738, 751 (5th Cir. 2011) ("There must be an actual discharge into navigable waters to trigger the CWA's requirements and the EPA's authority.").

The communities' conveyance of flows downstream to DITP, however, is not a discharge that triggers EPA' jurisdiction. A regulated discharge requires an "addition of any pollutant to navigable waters from [a] point source …." 33 U.S.C. § 1362(12)(A); 40 C.F.R. § 122.2. The communities' sanitary sewer systems, however, add no pollutants to navigable waters. Instead, they add pollutants only to MWRA's treatment works, as EPA concedes in the Fact Sheet. Fact Sheet 20 ("The Massachusetts municipalities in Appendix A own and

operate wastewater collection systems that *discharge flows to the DITP*" (emphasis added)). The only addition of pollutants to navigable waters occurs far downstream, when DITP discharges treated effluent from Outfall T01.[6]

EPA's rules reinforce the conclusion that the communities do not have discharges that trigger the Region's CWA authority. The regulatory definition of a "discharge of a pollutant" explains that the term encompasses releases "through pipes, sewers, or other conveyances owned by a State, municipality, or other person *which do not lead to a treatment works* …." 40 C.F.R. § 122.2. This language would only be necessary if the obverse is true: flows conveyed through municipally-owned sewers that *do* lead to a treatment works are not discharges.

The handful of cases holding "that persons who discharge pollutants through conveyances owned by another entity may be subject to NPDES permit requirements" provides no cure of EPA's lack of jurisdiction. *In re Charles River Pollution Control Dist.*, 16 EAD 623, 636 (EAB 2015). In each of these cases, the alleged discharges passed through point sources that were not treatment works and provided no treatment prior to discharge.[7] By contrast, the communities' flows receive treatment at DITP—a treatment works—prior to MWRA discharging to Massachusetts Bay. Under the Act and EPA's regulations, the communities' flows are not discharges that EPA may regulate.

2. The State Permit

For these reasons, MassDEP regulation of the Co-permittees in the State Permit is inconsistent with the regulations governing Surface Water Discharge Permits. The Surface Water Discharge Permit regulations, like CWA, generally tie their permit requirement to persons who "discharge pollutants to surface waters …." 314 CMR 3.03(1). And much like the federal program, the regulations define a "discharge" as an "addition of any pollutant to waters of the Commonwealth," and explain that a discharge includes "discharges through … sewers, or other conveyances owned by a … municipality … which do not lead to a POTW."

The sanitary systems' conveyance of flows to DITP involves no addition of pollutants to any waters of the Commonwealth. They add flows only to the downstream POTW, a circumstance that the regulations indicate is not a discharge that requires a permit.

B. The Co-Permittees Cannot Be Regulated by Deeming Them Part of the Same POTW as DITP.

1. The Federal Draft Permit

[6] The Region's assertion that satellite sewer systems' lack of proximity to the "the ultimate discharge point is not material to the question of whether it 'discharges'" is inconsistent with the Supreme Court's interpretation of the Act. Fact Sheet, Appendix D at 13. In *County of Maui v. Hawaii Wildlife Fund*, the Court explained that "[t]ime and distance traveled are obviously important" to determining whether a regulated discharge has occurred. 140 S. Ct. 1462, 1476 (2020).

[7] *See United States v. Ortiz,* 427 F. 1278, 1280 (10th Cir. 2005) (discharges conveyed through a storm sewer); *San Francisco Baykeeper v. W. Bay Sanitary Dist.*, 791 F. Supp. 2d 719,769-70 (N.D. Cal. 2011) (sanitary sewer overflows discharged through a storm sewer); *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945, 946-47 (W.D. Tenn. 1976) (alleged discharges conveyed through a storm sewer).

The Region cannot cure its lack of jurisdiction by lumping the sanitary sewer communities in with the larger facility—the publicly-owned treatment works (POTW) that includes DITP—covered by the Draft Permit.[8] EPA's regulations define a POTW to be "a treatment works … which is owned by *a State or municipality*—expressed only in the singular. 40 C.F.R. § 403.3(q) (emphasis added). Similarly, the definition uses only the singular to refer to *"the* municipality … which has jurisdiction over Indirect Discharges to and discharges from such a treatment works." *Id.* (emphasis added). This deliberate use of the singular means that a POTW can only be owned by a single municipality, such that the communities' sewer systems cannot be part of same POTW as DITP.

The regulatory definition of a "discharge" confirms that the Region has improperly expanded the definition of POTW to span multiple communities' sewer systems. That definition covers "discharges through pipes, sewers, or other conveyances owned by … a municipality … which do not lead to a treatment works." 40 C.F.R. § 122.2. If a satellite collection system could be part of a POTW, there would never be circumstance where a municipally-owned sewer could "lead to a treatment works." Instead, this provision would refer to municipally-owned sewers "which are not *part of* a treatment works." The Region's attempt to make the Co-Permittees part of the same POTW as DITP cannot be reconciled with its own regulations.

Even if the Co-permittees' systems were part of the same POTW as DITP, this conclusion would not empower EPA to regulate these communities in the absence of a discharge. When a facility requires an NPDES Permit, the Region's authority extends only to its actual discharges. *See NRDC v. EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988) ("the CWA does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction … is limited to regulating the discharge of pollutants."). Even if the communities' sewers systems were part of the same POTW as DITP, EPA lacks authority to regulate their non-discharging activities.

2. The State Permit

MassDEP similarly cannot deem the communities' sewer systems part of the same POTW as DITP under its permitting regulations. The Surface Water Discharge Permit regulations—like their federal counterpart—define a POTW by reference to a single public entity rather than several. *See* 314 CMR 3.02 ("any device or system used in the treatment … of municipal sewage … which is owned by *a public entity*." (emphasis added)). Having chosen to define a POTW by reference to a single owner, MassDEP cannot include satellite systems owned by thirty-nine communities in the same POTW as DITP.

C. Permit Application Requirements Cannot Be Waived In Toto.

Even if EPA and MassDEP could regulate the Co-permittees in DITP's permit, issuance of a permit to thirty-nine communities that never submitted permit applications would violate their respective permitting regulations. EPA's rules specify that "[a]ny person who discharges … must submit a complete application …." 40 C.F.R. § 122.21(a)(1). The Region then "shall not issue a permit before receiving a complete application for a permit …." Without any permit applications from the sanitary sewer communities in hand, EPA cannot issue a permit imposing conditions on them.

[8] *See* Fact Sheet, App'x D at 10 (EPA may regulate satellite communities because they are part of "facilities subject to the NPDES program"); *id.* ("NPDES regulations similarly identify the 'POTW' as the entity subject to regulation.").

EPA may not sidestep this limit on its authority by waiving application requirements for the Co-permittees. *See* Fact Sheet 12, 21. EPA's March 8, 2023 letters to the sanitary sewer communities claimed that 40 C.F.R. § 121.21(j) authorized the Region to waive permit application requirements in their entirety. *See* Attachment A (Sample Waiver Letter). The Region's waiver authority under this provision, however, extends only "to any requirement under this paragraph [*i.e.*, the POTW-specific requirements in § 122.21(j)]." 40 C.F.R. § 122.21(j). Thus, EPA only could have waived discrete information requirements for treatment works, not the fundamental requirement that a regulated entity submit a permit application. *Accord* 64 Fed. Reg. 42434, 42440 (Aug. 4, 1999) ("EPA proposed the introductory paragraph of § 122.21(j) to allow the Director to waive any requirement in *paragraph (j)*" (emphasis added)). The Region violated its own regulations by attempting to waive the sanitary sewer communities' obligation to submit applications.

MassDEP similarly violated its regulations by seeking to regulate the Co-permittees in the State Permit without having received permit applications from them. The Surface Water Discharge Permit rules specify that "[a]ny person required to obtain a permit … shall complete and submit the appropriate application form(s)." 314 CMR 3.10(1); *see also* 314 CMR 2.03(1) "Any person required to obtain an individual permit … shall apply to the Department."). MassDEP then "shall not issue a permit before receiving a complete application …." 314 CMR 3.10(4); *see also* 314 CMR 3.02(2) "The Department shall not issue an individual permit … before receiving a complete application.").

Under this framework, MassDEP cannot issue a permit that regulates the Co-permittees. None of them have submitted applications for Surface Water Discharge Permits. MassDEP's regulations, moreover, do not offer the department *any* authority to waive permit application requirements.

III. Inclusion of Combined Sewer Communities as CSO-Responsible Co-Permittees.

A. Failure to Justify the Combined Sewer Communities' Inclusion.

The Draft Permit and State Permit take the momentous step of making BWSC, Cambridge, Chelsea, and Sommerville CSO-responsible Co-permittees without their consent or any substantive justification. Rather than explain the decision to include these communities in the Draft Permit, the Fact Sheet simply declares that their inclusion implements a "general practice … to integrate treatment plant and connected CSO authorizations into a single permit." Fact Sheet at 109, 128. The Fact Sheet, however, provides neither documentation nor examples of this so-called practice, particularly in situations where the treatment plant and combined sewers are operated by different municipalities or authorities.

Additionally, Appendix D provides no justification for the CSO-responsible Co-permittees' inclusion in the Draft Permit. The document only addresses co-permitting *sanitary* sewer systems. *See, e.g.*, Fact Sheet Appx. D at 4-7 (discussing sanitary sewer systems at length). Additionally, its central justification—that co-permitting satellite sewer systems is necessary to ensure that they are controlled under NPDES permits—is inapplicable to combined sewer systems. *See, e.g., id.* at 17 ("the addition of the satellite systems as co-permittees is necessary to ensure collection system operation and maintenance"). The CSO-responsible Co-permittees have historically been regulated under individual NPDES permits, and the Region has provided no explanation for why combining their permits with DITP's is beneficial to the four CSO-responsible Co-permittees, the environment, or the general public. Without any explanation in the Fact Sheet, the Advisory Board and its member communities lose a meaningful opportunity to comment on the Draft Permit.

The Supplemental Fact Sheet supporting the State Permit provides even less justification for MassDEP's decision to consolidate the CSO-responsible Co-Permittees' authorizations into DITP's permit. MassDEP has an obligation to provide a "summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions" in its fact sheets. 314 CMR 2.05(3)(c). Having provided none for including the CSO-responsible Co-Permittees in the State Permit, MassDEP has deprived the Advisory Board and the communities of a meaningful opportunity to comment on the State Permit and violated its regulations.

It is particularly critical that the agencies justify their decisions to force BWSC, Cambridge Chelsea, and Somerville into a co-permittee arrangement because this action departs from EPA guidance on writing permits for CSOs. Since 1995, EPA guidance has allowed permit writers to regulate under a single NPDES permit treatment plants and combined sewer systems (named as co-permittees) operated by different municipalities. EPA, *Combined Sewer Overflows – Guidance for Permit Writers* p. 2-8 to-9 (Sep. 1995). The guidance, however, cautions that "[s]uch co-permittee arrangements are subject to consent by the respective co-permittees." *Id.* at p. 2-9. The agencies must either obtain the CSO-responsible Co-permittees consent to being covered under the Draft Permit and State Permit or explain why they have decided to depart from longstanding, national guidance on this issue.

B. EPA's Regulations Do Not Allow the Region to Consolidate the Combined Sewer Communities' NPDES Permits with DITP's.

In addition to being inadequately explained, the Region's inclusion of the combined sewer communities in the Draft Permit is inconsistent with EPA's permitting regulations. The NPDES permitting rules allow for the consolidation of permit applications, but only under specific circumstances: (1) "[w]henever a facility or activity requires a permit under more than one statute," or (2) "whenever a facility or activity requires permits from both EPA and an approved State …." 40 C.F.R. § 124.4(a)(1), (c)(2).

These circumstances do not exist here. The Region is attempting to consolidate multiple *federal* permits all issued under the same statute, rather than consolidate permits issued under multiple statutes or multiple jurisdictions. Moreover, the combined sewer communities' CSOs are <u>not</u> part of the same "facility or activity" as DITP. These discharges are distinct from DITP's and are not, by definition, part of the same POTW as DITP. *See Montgomery Envt'l Coalition v. Costle,* 646 F.2d 568, 592 (D.C. Cir. 1980) (EPA appropriately interpreted the definition of treatment works to exclude CSOs).

IV. The Draft Permit and State Permit Do Not Define the Responsibilities of MWRA, the CSO-responsible Co-permittees and the Co-permittees with Adequate Clarity.

Even if EPA and MassDEP could lawfully structure DITP's permit to include both the CSO-responsible Co-Permittees and the Co-Permittees, neither the Draft Permit nor the State Permit define these parties' obligations with clarity sufficient to ensure that they are not held liable for conduct or events over which they have no control. The Advisory Board appreciates the attention that the Region has dedicated to this issue, as evidenced by the language appearing at the beginning of Part I.E.2 and the Region's invitation for comments on "the clarity of the several liability of" MWRA and the communities. Fact Sheet 21.

The Draft Permit and the State Permit, however, are not sufficiently clear about MWRA's and the communities' respective responsibilities and the potential liability that would flow from non-compliance. Part I.B and the Draft Permit's cover page, for instance, do not explain that MWRA and the CSO-responsible Co-

permittees are severally liable for their own activities and sewer systems. For example, one community should not be liable for another's failure to implement its Nine Minimum Controls, but the Draft Permit does not make this clear. Attachment B contains proposed revisions to the Draft Permit, including the cover page and Part I.B, that provide adequate clarity concerning MWRA's and the CSO-responsible Co-permittees' respective responsibilities and liabilities.

The cover page and Part I.E.2 must also be revised to provide MWRA and the communities with absolute clarity that MWRA is not responsible for the communities' noncompliance and vice versa. Any final permit issued by EPA and MassDEP must make clear that the communities cannot be held liable for violations of permit requirements applicable to DITP; the Draft Permit and State Permit fail to do this. Language in Part C, Part D, and Part E must also be clarified further to remove any ambiguity regarding the several liability of MWRA, the CSO-responsible Co-permittees, and the Co-permittees. Attachment B contains proposed revisions to the Draft Permit, and Attachment C contains proposed revisions to the State Permit to resolve these remaining ambiguities.

It is particularly critical that EPA and MassDEP clearly delineate these responsibilities to avoid disrupting the longstanding relationship between MWRA and the communities, and among the communities themselves. Each community and MWRA have their own responsibilities with respect to wastewater treatment, and collection system management and compliance.[9] Under its organic statute, MWRA must be accountable to the communities, rather than a manager or regulator of the satellite sewer systems it serves. An NPDES permit or Surface Water Discharge Permit that could make MWRA liable for the communities' conduct—or vice versa—could threaten that relationship.

Even if MWRA and the communities did not have this unique relationship, basic principles of fairness would demand that the agencies avoid confusion over MWRA's and the communities' respective obligations and liability. Noncompliance with an NPDES permit can result in both criminal and civil liability under federal law, and even private actors can sue to enforce an NPDES permit.[10] *See* 33 U.S.C. § 1319 (providing for federal enforcement of NPDES permits); *id.* § 1365 (providing for citizen enforcement). Against this backdrop, EPA's guidance for permit writing specifies "[e]ach permit must be written clearly and unambiguously so that compliance can be tracked effectively and the permit can be enforced if violations occur." *NPDES Manual* p. 11-21.

V. EPA Should Eliminate or Significantly Modify the Draft Permit's Major Storm and Flood Events Planning Requirements.

As representatives of the ratepayers subject to climate change challenges, the Advisory Board understands the need for resilient practices to address those challenges. The Advisory Board has long advocated for policies and practices that are both environmentally sound and ratepayer equitable – "Green and Fair." To that end, we look forward to working with state and federal regulators and other stakeholders to address climate preparedness in a technically-sound, legally-compliant, and economically-fair manner. Our

[9] *See* Acts of 1984 ch. 372, § 26(d), 1984 Mass. Acts 809 (each local body served by MWRA has "the charge and control of the respective water, waterworks and sewer works owned and used by said local body and not in the ownership, possession and control of [MWRA].").

[10] Failure to comply with a Surface Water Discharge Permit can similarly result in civil and criminal liability under the Massachusetts Clean Waters Act. *See* M.G.L. c. 21, § 42.

shared goal is protecting invaluable public resources while providing affordable, reliable wastewater and sewer services into the future.

That said, Part I.E.1.a and I.E.2.(e)(2) (the Major Events Planning Provisions) of the Draft Permit impose novel and onerous long-term obligations to develop and implement resiliency plans that would effectively highjack the communities' long-term planning efforts and burden their capital budgets. Far beyond requiring adequate operation and maintenance of existing facilities and sewer systems, these new provisions could require permittees to relocate existing assets or even construct new ones.

Part I.E. requires MWRA and the communities to prepare major storm and flood events plans for their wastewater treatment facilities and sewer systems, respectively, that will culminate in implementation of mitigation projects. These plans, which the Draft Permit requires to be updated every five years, must include (1) an asset vulnerability evaluation; (2) a systematic vulnerability evaluation, and (3) a mitigation measures alternatives analysis, and they must take into consideration future conditions, "specifically the midterm (i.e., 20-30 years) and long-term (i.e., 80-100 years) and, in the case of sea level change, the plan must consider sea level change." Draft Permit Part I.E.1.a, 2.e.(2). The Draft Permit requires that these plans will be implemented and contemplates that they will materially impact MWRA's and the communities' capital budgets. *See, e.g.*, Draft Permit at 35 n. 16.

The Advisory Board would expect that such a momentous, potentially burdensome new program would be well explained and amply justified in the Fact Sheet and Supplemental Fact Sheet. It is not. To be clear, the Advisory Board understands and appreciates the importance of addressing climate change and its impacts on Massachusetts communities and beyond. But those efforts must take place within the appropriate statutory and regulatory frameworks.[11] In announcing these new programmatic requirements, EPA has provided only a conclusory justification, and MassDEP has provided none. In order to give the Advisory Board and the communities an informed opportunity to comment, the agencies need to explain how they have statutory authority to impose the Major Events Planning Provisions. In addition, the Advisory Board and the public deserve a cost-benefit analysis of these novel and substantial requirements, which will take far longer than the Draft Permit's 12-month deadlines to develop and implement. Finally, EPA should assess whether existing planning efforts address or could be adapted to remedy the issues EPA seeks to address through the Major Events Planning Provisions.[12]

A. The Fact Sheet Provides Inadequate Support for These New Programmatic, Capital Planning Obligations.

In announcing new requirements that will impact MWRA's and the communities' planning and capital budgeting processes, EPA and MassDEP failed to provide the public with the information they need to make

[11] For example, EPA cites to a recent City of Leominster riverbank stabilization project as an example of the process that EPA envisions for plans to address climate change through the addition of these new requirements. Response to Comments, NPDES Permit No. MA010818 at 8 (Sept. 27, 2023). While that project may prove helpful in addressing climate change impacts, it is not a project undertaken as an NPDES permit requirement. That project took place under a FEMA Hazard Mitigation Grant Program that the municipality used to protect a main sewer line it had identified as vulnerable to flooding and failure. *Id.* For the reasons set forth herein, requiring capital improvements of this type would be inappropriate in an NPDES permit, and there are other programs more well-suited for those changes.

[12] Such an assessment would also help EPA and MassDEP articulate to the public what is missing from the Fact Sheet and Supplemental Fact Sheet: the objectives and basic reasons for creating this new program in DITP's permit.

informed comments. In writing a fact sheet, EPA must address "the significant factual, legal, methodological and policy questions considered in preparing the draft permit." 40 C.F.R. § 124.8(a). With respect to the Major Events Planning Provisions, the Fact Sheet falls far short of meeting this requirement, offering only conclusory assertions that these new planning and mitigation project requirements are needed "to ensure the proper operation and maintenance of" of DITP and regional sewers. Fact Sheet at 102-03.

These conclusions cannot be squared with the Draft Permit's requirements and leave the reader to wonder what "factual, legal, methodological, and policy questions" EPA considered when it developed these new risk mitigation provisions. The Major Events Planning Provisions go far beyond "proper operation and maintenance" of a treatment plant and sewers; they call for the potential to relocate facilities or even build entirely new infrastructure. EPA's justification cannot support the requirement it seeks to impose.

The Fact Sheet's terse explanation also leaves the public to wonder what methodological and policy questions informed EPA's decision to create these new planning obligations. Among other policy questions and factual issues, EPA must explain why NPDES permits are the appropriate vehicle for imposing climate change resiliency requirements on regional sewer systems, why the plans must consider long-term risks as far as 100 years out (more than twenty times longer than the term of any NPDES permit), and why plans must consider "extreme sea level change." EPA's regulations require it to address these and other important policy and methodological issues associated with these burdensome new planning obligations. The agency has failed to do so here, thereby depriving the Advisory Board, the communities, and the public of a meaningful opportunity to comment on these new permit terms.

MassDEP similarly failed even to provide the cursory explanation that the Fact Sheet offers. The Supplemental Fact sheet provides no explanation for why MassDEP believes it would be appropriate to impose these planning and implementation obligations in Surface Water Discharge Permit. By failing to do so, MassDEP violated its own obligation to describe "the significant factual, legal, methodological and policy questions considered in preparing the draft permit." 314 CMR 2.05(3).

B. The Draft Permit's Major Events Planning Provisions Improperly Regulate Facilities and Assets, Not Discharges.

The Fact Sheet also fails to explain how the CWA authorizes EPA to use an NPDES permit to impose planning obligations that could culminate in MWRA or the communities having to relocate infrastructure or even build new facilities. In its cursory explanation for these new programmatic obligations, EPA does not once cite the statute or describe how the CWA empowers the agency to impose these wide-ranging requirements as part of the NDPES program. *See* Fact Sheet 101-03.

The Advisory Board can only surmise that EPA provided no explanation because the CWA does not authorize the Major Events Planning Provisions. The CWA allows NPDES permits to impose only those conditions necessary to ensure compliance with the CWA's requirements for discharge quality.[13] Courts have

[13] *See* 33 U.S.C. § 1342(a)(2) (limiting EPA authority to impose permit requirements to those terms "that assure compliance with the requirements of paragraph (1) of this section," referring to 33 U.S.C. §§ 1311, 1312, 1326, 1317, 1318, and 1343).

repeatedly held that the CWA limits EPA's authority to only regulating discharges; EPA cannot use NPDES permits to regulate other aspects of a discharging facility.[14]

The Major Events Planning Provisions, however, reach well beyond EPA's authority to regulate discharge quality. The Draft Permit's provisions for broad ranging evaluations of asset location and vulnerability—and the implementation of potentially costly capital projects to address them—has no apparent relationship to assuring compliance with applicable effluent limitations. Moreover, the Major Events Planning Provisions even contemplate that MWRA or the communities may need to construct "remote locations" or "[r]elocate facilities to higher elevations." Draft Permit Part I.E.2.e.(2)i.(c)(ii), (iv). Such requirements at their heart seek to regulate MWRA's and the communities' facilities (and capital planning processes), not their discharges. EPA's authority to issue NPDES permits does not extend this far, and the Major Events Planning Provisions should be removed from any final permit.[15]

EPA cannot cure its lack of authority to impose these major storm and flood event requirements by invoking 40 C.F.R. § 122.41(d) and (e). *See* Fact Sheet 101. These regulations do not confer on EPA authority it otherwise lacks, and nothing in either regulation authorizes a permit writer to impose the types of long-term planning and capital project development that the Major Events Planning Provisions impose. 40 C.F.R. §122.41(d) requires a permittee to take all reasonable steps to minimize or prevent any discharge in violation of the permit with a reasonable likelihood of adversely affecting human health or the environment. This provision applies only where there is a discharge in violation of the permit, which is not at issue here.

40 C.F.R. § 122.41(e) similarly cannot support the Draft Permit's attempt to require MWRA and the communities to develop and implement plans that may ultimately necessitate, among other things, the relocation of existing infrastructure or the construction of entirely new facilities. This provision imposes an obligation only to operate and maintain the equipment and systems a permittee uses to comply with its NPDES permit. Nothing in that regulation authorizes EPA to direct a permittee to undertake capital construction projects or relocate equipment or systems that it uses to comply. Rather, that rule directs permittees to maintain equipment and systems they use to comply with express terms of their NPDES permits.[16] EPA's attempt to use this narrow regulation to justify requiring permittees to acquire or build new systems and equipment, perhaps in locations far from existing facilities or assets, simply cannot withstand scrutiny.

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[14] *See Waterkeeper All., Inc. v. U.S. E.P.A.*, 399 F.3d 486, 505 (2d Cir. 2005) ((“[T]he Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges—not potential discharges, and certainly not point sources themselves.”); *Natural Resources Defense Council v. EPA,* 859 F.2d 156, 170 (D.C.Cir.1988) (“[T]he [Clean Water Act] does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants.”); *see also Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 877 (8th Cir. 2013) (“effluent limitations are restricted to regulations governing ‘discharges from point sources into navigable waters.’” (citing 33 U.S.C. § 1362(11))).

[15] The Major Event Planning Provisions are also improper to the extent they will intrude on or govern the communities' decisions concerning the siting of wastewater treatment and conveyance facilities. By doing so, they would represent EPA impinging—without clear statutory authority to do so—on land use questions typically reserved to states and local governments under the Constitution. *See, e.g.*, *Rapanos v. United States*, 547 U.S. 715, 738 (“Regulation of land use … is a quintessential state and local power.”) (Scalia, J., concurring); *Hess v. Port Auth. TransHudson Corp.*, 513 U. S. 30, 44 (1994) (“[R]egulation of land use [is] a function traditionally performed by local governments.”).

[16] *See American Canoe Ass'n v. Dist. of Columbia Water and Sewer Auth.*, 306 F. Supp.2d 30, 46 (D.D.C. 2004) (citing NPDES Permit Writers' Manual for proposition that 40 C.F.R. § 122.41(e) “only requires permittees to maintain equipment in order to comply with other *express* permit provisions”).

C. The Major Events Planning Provisions' Decades-Long Planning Horizons Are Inconsistent with the CWA's Five-Year Terms for NPDES Permits and the Certainty Provided by the CWA's Permit Shield.

The Clean Water Act sets a five-year term for NPDES permits.[17] Although valid for only five years as a matter of law, the Major Events Planning Provisions impose significant obligations that require MWRA and Co-Permittees to consider and address hypothetical concerns that may or may not arise 20 to 30 years and 80 to 100 years after issuance of a final permit. EPA identifies no support in the CWA or its implementing regulations for including in a five-year permit obligations concerning hypothetical conditions decades past the permit's expiration, and there is none. *See Upper Blackstone Water Pollution Abatement Dist.*, 690 F.3d at 22 (rejecting permittee's argument for extension of an NPDES permit beyond five-year term because "neither the CWA nor EPA regulations allow the [permittee's] requested delay").

In addition to planning horizons that extend decades beyond the permit's five-year term, the Major Events Planning Provisions also purport to impose specific obligations more than five years from the permit's effective date. For example, the Draft Permit requires major storm and flood events plans to be updated "at least every five (5) years from the effective date . . . and must take future conditions into consideration." Draft Permit, Part I.E.1.a, I.E.2.e(2). Because NPDES permits are limited to five-year terms, an obligation to update these plans at least every five years will not arise during the term of the Draft Permit.

The Draft Permit's requirement for iterative planning, requiring updates on future conditions as data sources are revised or generated, over a decades-long planning horizon is inconsistent with the CWA Section 402(k), 33 U.S.C. § 1342(k). The CWA's "permit shield" provision protects permittees by deeming compliance with an NPDES permit as compliance with the CWA. This protection affords a permittee the certainty to know when the permit is issued what it must do to comply with its permit from the date of issuance through its five-year term. This certainty "insulate[s] permit holders from changes in various regulations during the period of a permit and to relieve permit holders of having to litigate the question of whether their permits are sufficiently strict. In short, Section 402(k) serves the purpose of giving permits finality." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977).

The Major Events Planning Provisions requirements that a permittee modify plans pertaining to climate change projections spanning 80 to 100 years "as data sources used for such evaluations are revised or generated" contravenes and undermines the "finality" Congress intended Section 402(k) to afford. *See* Draft Permit Part I.E.1.a, I.E.2.e(2). Consequently, a permittee will not know when it receives the permit what it will need to do to comply through the duration of the permit's term. As a practical matter, the modification requirements threaten to place MWRA and its member communities in a perpetual, never-ending planning cycle without any certainty about their compliance obligations. This is improper because it will deprive MWRA and the communities of the certainty Congress intended to afford permittees when it enacted Section 402(k): the ability to plan for the full extent of their CWA obligations when EPA issues their permits.

[17] 33 U.S.C. §§ 1342(a)(3), (b)(1)(B); 40 C.F.R. § 122.46(a); *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 22 (1st Cir. 2012); *Manasota-88 Inc. v. Thomas*, 799 F.2d 687, 688 n.1 (11th Cir. 1986) ("NPDES permits are issued for a fixed term not to exceed five years"); *see also* 314 CMR 3.11(8) (providing that discharge permits issued by Massachusetts "shall be effective for a fixed term not to exceed five years" but allowing MassDEP to issue a permit "for a lesser duration").

D. The Major Events Planning Provisions Impose Significant Cost Burdens, Particularly for Smaller Communities, Without the Benefit of a Cost-Benefit Analysis.

The financial and resource burdens of developing, implementing, and updating storm and flood event plans that the Major Events Planning Provisions require will be significant, especially for smaller communities with limited financial and staffing resources. The investments to undertake this work, including the up-front vulnerability and mitigation alternatives analysis and the significant implementation and ongoing re-evaluation requirements, will likely require thousands of hours of personnel or consultant time. These costs could pale in comparison to the potential capital costs that MWRA and the communities may incur in order to implement mitigation measures that could even require relocating existing facilities or building new ones. The associated financial burdens on MWRA and the communities are unknown but certain to be substantial. MWRA and the communities will likely need to adjust their investments in critical infrastructure and other improvements to meet these new requirements, and ratepayers will likely absorb any associated financial burdens in the form of increased rates.

These financial burdens are unknown because EPA and MassDEP are imposing them without having assessed the costs and associated benefits of the Major Events Planning Provisions. Moreover, most, if not all, utilities will likely need additional staffing resources to undertake these novel and substantial requirements. At the very minimum, before issuing a final permit, EPA or MassDEP should provide permittees, their ratepayers, and the public with a formal cost-benefit assessment that informs all interested parties of the cost burdens of implementing these novel and significant planning and implementation requirements along with the perceived benefits of the Major Events Planning Provisions so that they may understand how those perceived benefits compare to benefits of other capital projects, including projects that aim to improve water quality.

E. The Requirement to Develop and Begin Implementing Major Storm and Flood Plans Within One Year Is Unrealistic.

The Major Events Planning Provisions require MWRA and the communities to develop plans that analyze individual facility and sewer system-related assets and assess vulnerabilities, conduct a systemic vulnerability evaluation of each individual system and develop an alternatives analysis, and begin implementing mitigation measures, all within twelve months of permit issuance. Permittees of any size will need more than twelve months to plan and begin to implement these wide-ranging plans. If EPA insists on including major storm and flood planning requirements, the agency should allow MWRA and the communities at least thirty-six months to develop and begin implementing major storm and flood events plans for wastewater treatment facilities and sewer systems.

F. The Draft Permit Sets Forth Ambiguous Planning Standards for Major Storm and Flood Events Plans.

The Major Events Planning Provisions require MWRA and the communities to design and implement measures to mitigate impacts of major storm and flood events, but it does not articulate a clear standard for doing so. The Draft Permit requirements set forth both an obligation to develop measures to "minimize the impact of major storm and flood events" and an obligation to select measures that are "the most effective." Draft Permit, Part I.E.1.a(1)iii, I.E.1.a(3), I.E.2.e(2)i.(c), I.E.2.e(2)iii. The Draft Permit defines "minimize" to mean "to reduce and/or eliminate to the extent achievable the impacts to the facilities." Part I.E.1.a(1)iii and n.10, I.E.2.e(2)i.(c) and n.24. But the Draft Permit does not reconcile how the notion of achievability of

measures in the definition of "minimize" plays a role in determining which measures are "the most effective" for purposes of permit compliance.

The Major Events Planning Provisions also call for a permittee to undertake a cost effectiveness analysis for its mitigation measure alternatives, but they do not specify or provide any guidance as to what role costs—or affordability—may play in selecting mitigation measures. *See* Draft Permit Part I.E.1.a(3), I.E.2.e(2)iii. For all of the reasons set forth herein, EPA should jettison the Draft Permit's novel Major Events Planning Provisions, but if EPA nevertheless retains these provisions in the final permit, the agency should clarify these ambiguities regarding the Major Events Planning Provisions' planning standards.

G. EPA Should Explore Whether Existing Efforts to Address Climate Change Are Adequate to Address the Concerns EPA Seeks to Address Through the Major Events Planning Provisions.

Before requiring MWRA and the Co-Permittees to implement the onerous Major Events Planning Provisions, EPA should assess whether and to what extent existing efforts to address climate change address or could be adapted to address the concerns EPA seeks to address through those planning requirements. For example, wastewater utilities in Massachusetts regularly seek funding from the Commonwealth's Clean Water State Revolving Fund (CWSRF) to obtain low interest loans for their asset management programs. The CWSRF requires all applicants to comply with a number of planning and asset management requirements as a prerequisite to obtaining funding under that program. EPA should assess whether and to what extent the existing CWSRF planning and asset management requirements provide the type of information and analysis EPA seeks through the Major Events Planning Provisions or could be adapted to provide that information. The CWSRF is a better tool to address long-term planning obligations than an NDPES permit that is limited to governing specific discharges over a five-year term.

VI. Adaptation Plan Requirements in Recently-Issued NPDES Permits in EPA Region 1 Suffer From Many of the Same Flaws as the Major Events Planning Provisions.

After making the Draft Permit available for public comment, EPA issued to municipalities in Massachusetts NPDES permits that require the development of "adaptation plans" that address climate change concerns and made public new agency guidance setting forth requirements for those plans ("Adaptation Plan Requirements"). The Adaptation Plan Requirements replace language in these permits that had been virtually identical to the Major Events Planning Provisions in the Draft Permit but fail to correct the flaws outlined above.

For example, as discussed above, the Clean Water Act sets a five-year term for NPDES permits.[18] Like the Major Events Planning Provisions, the Adaptation Plan Requirements also require MWRA and Co-Permittees to consider and address hypothetical concerns that may or may not arise 20 to 30 years and 80 to 100 years after issuance of a final permit—decades after the permit will expire. EPA identifies no support in the CWA or its implementing regulations for including in a five-year permit obligations concerning hypothetical conditions decades past the permit's expiration. *See Upper Blackstone Water Pollution Abatement Dist.*, 690 F.3d at 22 (rejecting permittee's argument for extension of an NPDES permit beyond five-year term because "neither the CWA nor EPA regulations allow the [permittee's] requested delay").

[18] *See* Section V.C., *supra*.

The Adaptation Plan Requirements also seek to regulate capital planning and activities beyond the permissible scope of any NPDES permit. As discussed at length above, the CWA allows NPDES permits to impose only those conditions necessary to ensure compliance with the CWA's requirements for discharge quality.[19] EPA cannot use NPDES permits to regulate the facility itself, which is precisely what the Adaptation Plan Requirements seek to do.[20]

At the heart of the Adaptation Plan Requirements are directives to assess and prepare a plan for implementing "adaptive measures," which EPA defines to include "building or modifying infrastructure," among other measures. *See, e.g.,* City of Northampton, Massachusetts Authorization to Discharge under the National Pollutant Discharge Elimination System - 2023 Final Permit ("Northampton 2023 Final Permit") at 13, n.9; *see also* EPA Region 1 Recommended Procedures and Resources for the Development of Adaptation Plans for Wastewater Treatment Systems and/or Sewer Systems at 9 (Sept. 27, 2023). As with the Major Events Planning Provisions, the Adaptation Plan Requirements' directives to assess and potentially implement significant capital projects[21] to address them bear no connection to the permissible scope of NPDES permit terms: assuring compliance with applicable effluent limitations. These requirements impermissibly seek to regulate MWRA's and the communities' facilities (and capital planning processes), not their discharges. They also threaten to encroach upon land use decisions reserved to states and local governments. Because they exceed EPA's authority to issue NPDES permits, the Adaptation Plan Requirements should not be included in the final permit.

The Adaptation Plan Requirements' failure to heed the distinction between permissibly regulating discharges and impermissibly regulating facilities in an NPDES permit is highlighted by their definition of the "impacts" of major storm and flood events that a permittee or co-permittee must assess:

> "Impacts" refers to a strong effect on an asset and/or asset-related operation that may include destruction, damage or ineffective operation of the asset and/or asset operation. Impacts may be *economic, environmental, or public health related*.

Northampton 2023 Final Permit at 12, n.9 (emphasis added).

The Adaptation Plan Requirements direct permittees to assess the ability of their assets to function in the event of these impacts "in terms of effluent flow . . . and discharges of pollutants." *Id*. at 12. While *environmental* impacts of major storm and flood events on assets and operations might relate to how major storm and flood events affect the quality of a facility's discharge, *economic and public health impacts* of major storm and flood events have no bearing on whether a facility's discharges meet applicable effluent limitations. In the absence of a connection between economic and public health impacts and the quality of effluent flow and

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[19] *See* Section V.B., *supra*.

[20] *See Waterkeeper All., Inc. v. U.S. E.P.A.*, 399 F.3d 486, 505 (2d Cir. 2005) (("[T]he Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges—not potential discharges, and certainly not point sources themselves."); *Natural Resources Defense Council v. EPA,* 859 F.2d 156, 170 (D.C.Cir.1988) ("[T]he [Clean Water Act] does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants."); *see also Iowa League of Cities v. EPA*, 711 F.3d 844, 877 (8th Cir. 2013) ("effluent limitations are restricted to regulations governing 'discharges from point sources into navigable waters.'" (citing 33 U.S.C. § 1362(11))).

[21] *See, e.g.*, Northampton 2023 Final Permit at 14 (requiring revision of Adaptation Plan "if on- or off-site structures are added, removed, or otherwise significantly changed in any way that will impact the vulnerability of the WWTS or sewer").

discharges, there is no basis for EPA to require assessment of those impacts. At a minimum, the requirement to consider economic and public health impacts of major storm and flood events on assets and asset-related operations should be removed from the final permit.

The three "Components" of the Adaptation Plan Requirements also raise the following concerns:

Component 1 requires a permittee to perform "an identification of critical assets and related operations … *that are most vulnerable* due to major storm and flood events . . . ." Northampton 2023 Final Permit at 12 (emphasis added). As written, this provision suggests the need for the permittee to make a subjective judgment of which assets and asset-related operations are "most vulnerable" to major storm and flood events before moving on to assess whether "these critical assets and related operations" can function properly. Component 1 would provide more clear direction to permittees if it required only an identification of critical assets and related operations, without an initial assessment of their relative vulnerability. The second step would then consist of a vulnerability assessment—an analysis of whether those assets and operations can function properly.

Component 2 is ambiguous and confusing as drafted. Component 2 requires a permittee to undertake "an assessment of adaptive measures … that minimize the impact of future conditions on the critical assets . . . ." Northampton 2023 Final Permit at 13. The sentence that follows requires a permittee to "select the most effective adaptation measures" for those critical assets "at the highest risk of not functioning under such conditions." *Id.* In addition to introducing a new, undefined term – "adaptation measures" (as opposed to "adaptive measures," which are defined) – this sentence also creates an internal inconsistency: Does this component require a permittee to assess all critical assets or just those assets that are at the highest risk of not functioning? To the extent the final permit includes the Adaptation Plan Requirements, this inconsistency should be clarified and resolved.

A permittee's obligations under Component 3 are also ambiguous due to the inconsistencies in Component 2. Component 3 requires a permittee to develop a schedule for implementation and maintenance of adaptive measures "for each of the critical assets and related operations of the WWTS and sewer system . . . ." Northampton 2023 Final Permit at 13. This suggests that Component 3 requires a permittee to provide this schedule for *all* of its critical assets, but a reasonable interpretation of Component 2 suggests that a permittee need only identify adaptive measures for critical assets that are "at the highest risk of not functioning." *Id.* EPA will need to resolve this ambiguity to the extent the final permit contains the Adaptation Plan Requirements.

In more recent permits, Component 3 also requires a permittee to include in its implementation and maintenance schedule "an evaluation of how each adaptive measure taken (or planned) will be funded." Hoosac Water Quality District Authorization to Discharge under the National Pollutant Discharge Elimination System - 2023 Final Permit ("Hoosac 2023 Final Permit") at 12. This addition is problematic because it requires a permittee to undertake a funding evaluation for measures that may not need to be taken for thirty or more years, if ever. Assessing funding for improvements that may not be implemented for decades would only be speculative and require municipalities to expend scarce ratepayer resources to conduct an evaluation that will be of little value to the permittee, regulators, or the public.

VII. Additional Issues in the Draft Permit that EPA Must Address

In addition to the foregoing, the Advisory Board has identified the following errors in the Draft Permit that must be corrected:

Part I.E.2.c.(4): This provision, which requires MWRA to submit an annual summary report concerning actions taken to reduce infiltration and inflow, appears to be incomplete. In its current form, this permit term provides summary and background information but does not appear to be drafted as formal permit language. EPA must revise this language and reissue the Draft Permit for public comment so that the Advisory Board and the communities can meaningfully comment on them.

Part I.E.2.c.(4): This provision, which "requires the Co-permittees to prepare and submit I/I Reduction Plans," appears to be incomplete. In its current form, this permit term provides summary and background information but does not specify the substantive content of the required I/I Reduction Plans. EPA must specify what these plans include and re-issue the Draft Permit for public comment so that the Advisory Board and the communities can meaningfully comment on them.

Part I.E.2.(e)(3)(ii): This provision currently reads, "A preventive maintenance and monitoring program for the collection system; including resiliency evaluation and planning that the Permittee, Co-Responsible Co-permittees and Co-permittees owns and operates." In its current form, this language is hard to follow and likely reflects drafting errors. The Board proposes that this provision be revised to read, "A preventive maintenance and monitoring program for the collection system that Permittee, CSO-responsible Co-Permittees, and Co-Permittees each own and operate."

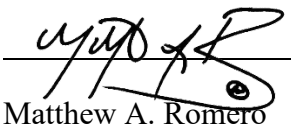
Part I.E.2.(e)(3)(iii): Although this provision applies to CSO-responsible Co-Permittees, it introduces confusion by referring to "the *sanitary* sewer collection system." To eliminate this confusion, the Advisory Board requests that EPA delete the word "sanitary."

Part I.E.2.(e)(3)(iv): This provision currently reads, "Description of funding, the source(s) of funding and provisions for funding sufficient for implementing the plan that the Permittee, CSO-responsible Co-permittees, and Co-permittees owns and operates plan." In its current form, this language is hard to follow, a likely product of a drafting mistake. The Board proposes that this provision instead read, "Description of funding, the source(s) of funding and provisions for funding sufficient for implementing the Plan that the Permittee, CSO-Responsible Co-permittee, or Co-permittee has developed."

VIII. Conclusion

The Advisory Board appreciates the opportunity to comment on the Draft Permit and State Permit. Please feel free to contact the Board's Executive Director, Matthew Romero (Matthew.Romero@mwraadvisoryboard.com; 617-788-2054) if you have any questions or would like to arrange a meeting to discuss the resolution of the issues raised above.

Sincerely,



Matthew A. Romero

Executive Director | MWRA Advisory Board