CITY OF CHELSEA, MA
Department *of* Public Works

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RE: Comments on Draft Permit No. MA0103284

Dear Ms. Barden and Ms. Golden:

The City of Chelsea (Chelsea) appreciates this 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), which the U.S. Environmental Protection Agency – Region 1 (EPA or the Region) noticed for comment on May 31, 2023.[1] As one of the entities subject to the terms of the Draft Permit once finalized, the City of Chelsea writes to express its support for the comments submitted by the Massachusetts Water Resources Authority Advisory Board (Advisory Board), which are incorporated by reference as set forth herein, and also to write separately to articulate and highlight issues of particular concern to our community.

As an initial matter, Chelsea has substantial concerns about the Draft Permit's imposition of a novel requirement to develop and implement a major storm and flood event plans for its sewer system. This requirement will impose significant financial and resource burdens on Chelsea and other Environmental Justice communities. The extent of these burdens is unknown because neither EPA nor MassDEP has conducted any cost-benefit analysis of this new requirement.

Chelsea also has significant concerns about the Draft Permit's directive to complete and begin implementing a plan within twelve months of the effective date of the final permit. Our community is further concerned that the mandate to modify its plan whenever new data are generated or discovered threatens to cast aside local planning priorities in favor of a federally mandated, perpetual planning cycle.

[1] On May 31, 2023, the Massachusetts Department of Environmental Protection (MassDEP) also issued a draft 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.

I. Major Storm and Flood Events Planning Requirements

Part I.E.2.(e)(2) of the Draft Permit (the Major Events Planning Provisions) would impose on Chelsea and other cities novel and onerous long-term obligations to develop and implement plans to address sewer systems climate change resiliency. 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."

These requirements will strain City resources and disrupt its broader capital planning process. The Draft Permit also gives Chelsea insufficient time to complete its plan. We further believe that EPA lacks the authority to impose this new planning and project development obligation in DITP's NPDES permit, and both EPA and MassDEP have failed to justify this new set of obligations.

EPA has not evaluated the costs of these Provisions and the impact on other projects critical to this Environmental Justice community.

The City of Chelsea agrees that considerations for climate change and major storms is an important part of capital planning for the sewer and drain system. Consequently, we have already put in several years of work to develop models and long range plans for our system. However, complying with the Major Events Planning Provisions will impose substantial new costs on Chelsea. The investments to undertake this work will include substantial fees to outside consultants or new internal staff to develop the evaluation and analysis as dictated. These are funds that could better put to use implementing existing plans for climate resiliency.

These additional costs will ultimately impact other parts of Chelsea's budget, resulting in lower spending on other critical infrastructure or other community needs. The City of Chelsea has several large projects to address major storm events that are in both planning and implementation stages. However, the EPA's overly prescribed Provisions will require that we start again from scratch with planning efforts in order to document the process per the Draft Permit. This will be an unnecessary and redundant expenditure of funds which could instead be directed to further the work already in progress. These planning costs will likely derail or delay current sewer infrastructure improvement projects without resulting in any substantially better outcome for residents.

EPA and MassDEP should evaluate these costs before finalizing the Major Events Planning Provisions. At the very minimum, before issuing a final permit, EPA or MassDEP should provide Chelsea and the public more generally 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.

The Major Events Planning Provisions Do Not Provide Sufficient Time for Compliance.

The Major Events Planning Provisions provide Chelsea inadequate time to develop a plan that must accomplish the following: (1) analyze sewer system-related assets and assess vulnerabilities, (2) conduct a systemic vulnerability evaluation of each individual system and develop an alternatives analysis, and (3) begin implementing mitigation measures. Draft Permit Part I.E.2.(e)(2). The Draft Permit affords Chelsea and its peer communities only 12 months to accomplish these tasks, an amount of time that is obviously insufficient to (a) retain the necessary staff or consultants, (b) review the historical records and complete the tasks required by the Draft Permit, and (c) work with our City Council to approve, and allocate or acquire the capital to complete the required tasks.

We are very concerned that EPA does not understand the effort of, and scope for, a climate vulnerability assessment and encourage EPA to revisit these permit requirements based on discussions with the outside professionals that cities will retain to perform these studies. If EPA and MassDEP insist on including the Major Events Planning Provisions, the agencies must provide Chelsea and other communities a reasonable deadline to complete this major undertaking. Any final permit should allow the communities at least sixty months to develop and begin implementing major storm and flood events plans.

The Agencies Should Explore Whether Existing Programs Achieve the Objectives of the Major Events Planning Provisions.

Before requiring Chelsea to expend the significant resources necessary to comply with the onerous Major Events Planning Provisions, the agencies should assess the extent to which existing efforts or programs address or could be adapted to address the interests EPA seeks to protect through the Major Events Planning Provisions. For example, wastewater utilities in Massachusetts regularly seek funding from the Commonwealth's Clean Water State Revolving Fund (CWSRF), and this program already requires applicants to comply with planning and asset management requirements in order to receive funding. The agencies may find that the CWSRF is a better tool to address long-term planning obligations than a NDPES permit that is limited to governing specific discharges over a five-year term. As noted above, the City of Chelsea has already invested in long range planning around CSO infrastructure which this permit fails to acknowledge.

EPA and MassDEP Failed to Justify These Planning Requirements.

In addition to the foregoing issues, Chelsea is concerned that it has not had an adequate opportunity to comment on the Major Events Planning Provisions because EPA and MassDEP have failed to document how these Provisions were developed. Both agencies' fact sheets must address "the significant factual, legal, methodological and policy questions considered in preparing the draft permit." 40 C.F.R. § 124.8(a); 314 CMR 2.05(3). For a set of programmatic requirements as important and sweeping as the Major Events Planning Provisions, one would expect substantial discussions of the various "factual, legal, methodological and policy questions" each agency considered.

EPA, however, justified the Major Events Planning Provisions by simply declaring them "necessary to ensure proper operation and maintenance" of wastewater treatment infrastructure.[2] Fact Sheet at 102-03. This does not appear to be sufficient basis for including these requirements for Flood Event Plans. Is there a rule that EPA has passed that cites inclusion of these requirements and if so, what is it? EPA often has internal documents like a memorandum that convey permit requirements. Is there an internal EPA document that would prompt inclusion of the new Flood Events Plans requirements, and if so, what is it? If Chelsea and the public are to have a meaningful opportunity to comment on the Draft Permit, the agencies must better explain the Major Events Planning provisions and allow for additional public comment.

Chelsea joins the MWRA Advisory Board in suspecting that EPA may have failed to justify the Major Events Planning Provisions because it lacks authority to impose them under the Clean Water Act (CWA). The statute limits EPA's authority under the NPDES program to regulating discharges, not the wider facility (or facilities) that discharge. *See, e.g.*, *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."). The Major Events Planning Provisions, however, reach far beyond regulating discharges by potentially regulating the location of permittees' facilities or even requiring the construction of additional infrastructure. Because the Major Events Planning Provisions exceed EPA's jurisdiction under the CWA, they should be removed from any final permit.

Requirements are Vague and Planning Horizons are Inconsistent with Existing Statewide Data and Projections

Should these Planning Provisions be retained in the final Permit, Chelsea is concerned that the requirements are vague and inconsistent with statewide data and projections.

Part I.E.2.e (2) i. (a) states "The Asset Vulnerability Evaluation shall include, at a minimum, the following: (a) Description of planning priorities related to the location of the sewer system." The EPA should better clarify what it means by "planning priorities."

Part I.E.2.e (2) i. (c) states "Description of structural improvements, and/or other mitigation measures to minimize the impacts of major storm and flood events to each specific asset identified in Part I.E.2.e.(2).i.(b) above. The Permittee, CSO-responsible Co-Permittees, and Co-permittees shall consider, at a minimum, the following measures:" This entire section is not clear should be re-evaluated and presented with a linear thought process.

In Part I.E.1.a (pg. 31) and Part I.E.2.e (2), EPA is proposing that "At a minimum, the Plan must take future conditions into consideration, specifically 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 extreme sea level change." These planning horizons should be consistent with the Massachusetts statewide

[2] This explanation appears inconsistent with what the Major Events Planning Provisions require. They do far more than ensuring "proper operation and maintenance" by requiring Chelsea and other towns to consider—and possibly pursue—relocating facilities or building entirely new ones. Draft Permit Part I.E.2.e.(2)i.(c)(ii), (iv).

projections, and therefore this section should be revised to reflect the newest Massachusetts State Hazard Mitigation and Climate Adaptation Plan (2023 ResilientMass Plan) and the Climate Change Assessment. In addition, there are no climate change projections used in the State's planning for 100 years from now as the state's planning is focused on around 2070 and available data end at 2090/2100.

In Footnote 3 and Footnote 18, EPA elaborates that communities must "conduct the evaluation using, at a minimum, the worst-case data relating to changes in precipitation, sea level rise, extreme weather events, coastal flooding, inland flooding, sewer flow and inflow and infiltration and relevant to the facilities from" three specific sources of data. Chelsea is concerned that this approach is inconsistent with using data provided by the State, more recent data, site specific data, and data from specific storm events, all of which are more useful and reflect location conditions.

Lastly, Chelsea is concerned about a number of definitions. Please clarify and define "high water events", "high tide flooding", and "extreme/heavy precipitation" as there are many interpretations of these terms. All terms should be consistent with State plans.

II. Chelsea Objects to the Inclusion of Combined Sewer Communities as CSO-Responsible Co-Permittees.

EPA And MassDEP Have Failed To Justify Including CSO Communities As Co-Permittees.

The Draft Permit and State Permit take the momentous step of making Chelsea a CSO-responsible Co-permittee without its consent and without any substantive justification from MassDEP or EPA. Rather than explain the decision to include Chelsea and three other combined sewer overflow (CSO) communities in the Draft Permit, the Fact Sheet simply declares that their inclusion implements a "general practice is 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 different municipalities operate the treatment plant and combined sewers. Chelsea historically has operated under an individual NPDES permit, and the Region has not explained why combining its permit with DITP's is beneficial in any respect. Without any explanation in the Fact Sheet, Chelsea loses a meaningful opportunity to comment on EPA's decision.

The Supplemental Fact Sheet supporting the State Permit provides even less justification for consolidation of 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 violated its regulations and deprived Chelsea and the other CSO communities of a meaningful opportunity to comment on the State Permit.

Furthermore, treatment of all CSO-Responsible Co-Permittees within the same permit is not necessarily in the best interest of the populations that reside in and around these communities.

The Draft Permit fails to acknowledge the different degrees to which the four CSO-responsible Co-Permittees have reduced discharges, closed CSOs, or have developed plans to do so. The obligations of the Draft Permit around the Nine Minimum Controls (NMC) may lead to the reduction in funding for and efforts towards outright separation and CSO closure. At the very least, further explication of the timelines on implementing and reporting around the NMCs is necessary.

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).

III. The Draft Permit's Vague Water Quality Prohibitions Are Inconsistent with Applicable Law

Parts I.B.2.a and I.B.2.f (the Generic Prohibitions) impermissibly forces Chelsea to guess as to how it must control its CSOs to meet water quality standards (WQS). These provisions are categorically incapable of satisfying the Region's obligation to ensure that each NPDES permit complies with all of the CWA's requirements, including its command to protect WQS.[3] The Second Circuit has already held that generic prohibitions against violating water quality standards are *per se* invalid because they are "insufficient to give [dischargers] guidance as to what is expected or to allow any permitting authority to determine whether a [discharger] is violating [WQS]." *NRDC v. EPA*, 808 F.3d 556, 580 (2d Cir. 2015).

The Generic Prohibitions are also inconsistent with EPA's own permitting regulations and the *Combined Sewer Overflow (CSO) Control Policy*, 59 Fed. Reg. 18688 (Apr. 19, 1994) (the CSO Policy). Both prescribe a single, exclusive process for setting permit terms to protect WQS: determining whether an effluent limit is necessary by conducting a reasonable potential analysis and then setting a water quality-based effluent limitation (WQBEL) that is derived from

[3] *See* 33 U.S.C. § 1311(b)(1)(C) (requiring limits "necessary to meet water quality standards"); *id.* § 1342(a)(2) (requiring EPA to set conditions in NPDES permits "to assure compliance with the requirements of" the Act, including those for protecting receiving water quality).

applicable WQS and tailored to the discharger. *See* 40 C.F.R. § 122.44(d)(1); 59 Fed. Reg. 18695 (Phase II CSO permits must contain WQBELS set "under 40 CFR 122.44(d)(1)"); *see also* EPA, *NPDES Permit Writers' Manual* (*"NPDES Manual")* Ch. 6 (Sep. 2010) (describing process for setting WQBELs). The Generic Prohibitions, which EPA failed to justify or explain in the Fact Sheet, impermissibly circumvent this process.

Additionally, the Draft Permit includes sections that seemingly relate exclusively to DITF, but fail to make that explicit. Part I.E.3. reads, "the Permittee, CSO-responsible Co-permittees and co-permittees shall submit a summary report…" while I.E.3.f. reads, "If the average annual flow in the previous calendar year exceeded 80 percent of the facility's 361 MGD design flow…" which seemingly is only related to the Permittee and DITF and as such should be clearly stated, or better, separated into a new section in reference to DITF specific requirements.

This section, I.E.3., also provides an example of where the Draft Permit fails to clearly distinguish roles of all parties. The wording "the Permittee, CSO-responsible Co-permittees and co-permittees shall submit a summary report…" reads as all parties collaboratively submitting a report and as such should be reworded as "shall each submit". Such inconsistencies are further highlighted in Part I.J.1. "the Permittee shall continue to submit…using NetDMR" which fails to mention the method by which CSO-responsible co-permittees and co-permittees report, while Part I.J.2. states "the Permittee and Co-permittees shall" which excludes CSO-responsible co-permittees.

These inconsistencies with federal law also render the Generic Prohibition's incorporation in the State Permit illegal. 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 discharger-specific WQBELs. MassDEP's reliance on the Generic Prohibitions also violates its regulations requirement to set permit limits to protect water quality after considering "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 bypass this process, as reflected by the Supplemental Fact Sheet's omission of any discussion concerning these permit terms.

IV. General Comments

In Attachment A (Authorized CSO Outfalls and Responsible Parties) EPA lists "CHE008" twice on Pages 1 and 3. If CHE002 was meant to be included, please note that Chelsea permanently closed CHE002 on December 4, 2014. In accordance with Part 1.F of the current NPDES Permit, Chelsea sent a Notice of Elimination to regulatory agencies and stakeholders on December 4, 2014 and has not received a formal permit modification.

Attachment I (MWRA Authorized Typical Year CSO Discharge Activation Frequency and Volume) appears to be goals from the 2005 Long Term Control Plan. It is not clear in the Draft Permit whether this is now intended to be an outright performance obligation. This is concerning as the typical year frequency and volume is not consistent with current status. Please clarify the

intention behind including this Attachment and reference to it on page 21 of the Draft Permit. The City of Chelsea objects to the utilization of Attachment I as new discharge standards.

The Draft Permit suffers from a lack of consistency in how it refers to the parties it proposes to cover. Throughout the majority of the Draft Permit it uses "the Permittee" in reference to the MWRA, but beginning in Part I.I. uses "the Permittee, MWRA,". This language needs to be standardized across the Draft Permit.

Draft Permit Part I.D. the Notice of Elimination, significantly pares down language from the previous permit, eliminating the language, which outlines specifically to whom to give notice, "the Director of the Office of Ecosystem Protection at EPA and to the Director of the Wastewater Management Program at MassDEP."

The address for the City of Chelsea Department of Public Works should be listed as 500 Broadway, Room 310, Chelsea MA 02150.

V. Conclusion

Chelsea appreciates the opportunity to comment on the Draft Permit and State Permit. Please feel free to contact Isaac Smith, Environmental Compliance Coordinator at 857-335-7491 or ismith@chelseama.gov and/or Cate Fox-Lent, Commissioner of Public Works at 617-466-4203 or cfox@chelseama.gov if you have any questions or would like to arrange a meeting to discuss the resolution of the issues raised above.