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November 28, 2023

Michele Barden
USEPA Region 1
5 Post Office Square-Suite 100 (06-1)
Boston, MA 02109-3912

RE: Comments on Draft NPDES Permit for MWRA Deer Island Treatment Plant,
Winthrop, MA
NPDES Permit # MA 0103284
Comments via email to barden.michele@epa.gov

Dear Ms. Barden,

The Massachusetts Coalition for Water Resources Stewardship (MCWRS) is a non-profit organization representing the interests of municipalities, districts, and commissions in the world of wastewater, stormwater and drinking water. Members include municipal, district and commission wastewater, stormwater and drinking water utilities, engineering consultants, legal firms, and stormwater coalitions.

MCWRS offers the following comments on the EPA Region 1 draft NPDES permit for the Massachusetts Water Resources Authority (MWRA) Deer Island Treatment Plant in Winthrop, MA along with Combined Sewer Overflow Treatment Facilities and Combined Sewer Overflows. Our comments are limited to Part 1.E Operation and Maintenance and in particular the WWTF Major Storm and Flood Events Plan and the Sewer System Flood Events Plan.

MCWRS is disappointed to see completely new Major Storm and Flood Events Plan requirements and Major Storm Events Plan requirements appear in a number of recently issued draft NPDES permits for Massachusetts cities, towns and districts. This organization has reached out to Region 1 numerous times in the past 15 years asking for open communications and dialogue between your agency and the regulated community. We have asked for discussion on new and evolving NPDES permit concepts before they appear in draft permits so that our members can better understand why these changes are being made and potentially talk about alternative approaches. To our dismay, MCWRS is once again seeing Region 1 roll out novel requirements in draft permits with no previous discussion or mention. That these storm planning requirements will only apply to communities in Massachusetts, versus a national policy, is targeted and unjust.

Because EPA retains primacy over NPDES permits in Massachusetts does not give the agency any rights to use the cities and towns in this state as experimental test subjects. These storm event planning requirements must be removed from the MWRA permit and all other NPDES permits in Massachusetts until, EPA's authority to include these provisions in NPDES permits has been identified, alternative approaches to long-term storm mitigation planning has been considered and a nationwide approach to this matter has been transparently developed, proposed through a rule making process and implemented nationally. The people of Massachusetts who will pay the costs for NPDES permits compliance should not serve as guinea pigs for another EPA Region 1 overreach.

MCWRS has seen in recent final NPDES permits issued to Massachusetts communities (Westfield, Palmer, Northampton) that Region 1 has modified the Major Storm and Flood Events and Major Storm Events planning requirements. We commend EPA for recognizing that the compliance schedule included in the draft permits was unrealistic and offering a more reasonable schedule in the Adaptation Plan included in the final permits. However, even with these changes and a softening of the reporting requirements, the inclusion of this planning mandate remains objectionable in a NPDES permit and should be removed in its entirety from the MWRA permit and all other recently issued draft and final permits in Massachusetts.

MCWRS agrees that planning for potential storm damage to facilities located in flood prone areas may be of value to some communities and should certainly be encouraged. Such planning requirements do not belong in a NPDES permit. Rather, the Federal and State governments should work cooperatively with wastewater utilities on a program independent of NPDES or the Clean Water Act to encourage planning for storms. Further, there should be a dedicated grant program to fund planning and adaptation implementation exclusively for wastewater utilities.

MCWRS' objections to the inclusion of Major Storm and Flood Events Planning, Storm Events Planning and Adaptation Planning in NPDES permits are based on the following:

1. The EPA lacks legal authority to include storm/flood planning and implementation requirements in NPDES permits. The NPDES program mandates the mitigation of actual discharges to reduce or eliminate pollutants from entering receiving waters. Storm/flood planning is not mitigation but adaptation (in recent final permits it is called Adaptation Planning) to address some future condition that may potentially impact facilities. This planning requirement is unrelated to a point source, discharge, receiving water or pollutant load, making this provision outside the realm of NPDES.
2. Inclusion of the storm/flood planning and implementation requirements within the Operations and Maintenance section of the permit is puzzling. Proper operations and maintenance (O&M) of a wastewater facility would not include long term storm planning. This adaptation planning for climate change is too far removed from traditionally recognized O&M activities to be included in this section. It is telling that EPA forced this provision into a section of a permit where it clearly does not belong.
3. The Clean Water Act implementing regulations include language that provides permittees with an affirmative defense to an enforcement action should noncompliance be caused by unintentional factors beyond the reasonable control of the permittee. Flooding of a wastewater facility that results in a temporary exceedance of discharge limits would typically be covered by this Upset Provision. This requirement to develop storm/flood

adaptation plans and to implement the same renders the Upset Provision moot. Once a wastewater utility is required to have a plan to address floods or storm damage to facilities, its ability to use the upset defense is effectively lost. A utility that exceeds discharge limits due to storm damage would be viewed as having failed to adequately plan and implement its storm/flood adaptation strategy and would therefore be at fault even if a flood damaged its facility. A requirement within a NPDES permit should not have the ability to render a regulatory affirmative upset defense meaningless.

4. The legal basis for the storm/flood/adaptation planning in the permit was not articulated. It appears to be based on non-binding federal policy statements and guidance documents which is clearly beyond EPA authority. The Fact Sheet for the MWRA Draft permit provides only a vague description of the storm/flood plan requirement and does not explain the underlying legal authority. EPA has suggested that President Biden's 2021 Executive Order 14008 was a driver behind the planning requirements in Massachusetts NPDES permits. However, EO14008 directed federal agencies to draft climate action plans describing the steps each agency will take "with regard to its facilities and operations to bolster adaptation and increase resilience to the impacts of climate change". It appears that EPA took this directive beyond its own facilities and operations and decided in its climate action plan to incorporate storm planning in NPDES permits. EO 14008 cannot be construed to affect the authority granted to EPA by the Clean Water Act and is not an adequate legal basis for imposing new duties on a permittee because it reaches beyond the authority delegated by Congress in the CWA.
5. Permit provisions that only apply to Massachusetts violate the equal sovereignty principle under the tenth amendment and are unconstitutional. Massachusetts is one of the few remaining states where NPDES permits have not been delegated. EPA Region 1 writes the permits for Massachusetts but EPA still retains control over Clean Water Act implementation by the states and regularly mandates delegated states to add new provisions to NPDES permits. There is no evidence, however, of EPA ordering or directing any delegated states to include storm/flood/adaptation planning to NPDES permits. In fact, even in states where EPA retains primacy over NPDES permits, recent permits do not all include the climate planning requirements. In April 2023 EPA Region 1 issued a revised draft permit for Portsmouth, New Hampshire's Peirce Island Wastewater Treatment Facility (NH0100234). That revised draft permit did not include any storm/flood planning requirements. A final permit was issued for Peirce Island in September 2023 with no mention of storm/flood/adaptation planning. If Region 1 were looking to include these climate adaptation planning requirements in NPDES permits it had an opportunity to do so with the Peirce Island permit and chose not to. The timeline of this permit is similar to the Massachusetts permits issued as drafts in spring 2023 and as final in September 2023, all of which include the planning provisions. MCWRS is not suggesting that New Hampshire wastewater utilities should be subject to the storm planning requirements-no one should. Rather, we point to this New Hampshire permit to highlight Region 1's unequal application of its own NPDES permit "rules". Massachusetts is certainly not unique in risks posed by climate change so there should be no reason to single out this state with climate change driven requirements in NPDES permits.

6. MWRA and co-permittees are required to develop both a WWTF Major Storm and Flood Events Plan and a Sewer System Major Storm and Flood Events Plan that include an Assets Vulnerability Evaluation, a Systems Vulnerability Evaluation and an Alternatives Evaluation within 12 months of the permit effective date. That timeframe for completion and submittal of these detailed plans is untenable and in most cases impossible to achieve. These plans will require outside engineering consultants and be extremely costly to produce. The short timeframe only adds to the cost which will fall on ratepayers while everyday expenses are spiraling ever higher.
7. Storm event planning as envisioned has value to communities, but does not belong in a NPDES permit. Such planning appears well-suited to a federal grant program as opposed to an enforcement approach via a permit. Congress, in its 2021 Bipartisan Infrastructure Law (BIL), clearly understood this and directed EPA to “establish a clean water infrastructure resilience and sustainability program ...(to) award grants to eligible entities for the purpose of increasing the resilience of publicly owned treatment works” to natural hazard vulnerabilities. Why has EPA chosen an unfunded permit approach rather than a grants program to address wastewater system resiliency as directed by Congress and signed by President Biden?

EPA Region 1 is off the mark with the requirement for storm/flood event planning and adaptation planning via NPDES permits. This surprising new initiative is inconsistent with the intent of the NPDES program and is an affront to the cities, towns and districts of Massachusetts who should not be subjected to conditions unknown to the rest of the nation. Remove these provisions from the MWRA Deer Island permit and other recently issued draft and final permits and seek a more open and cooperative approach to address such plans that includes full federal funding through a grants program as directed by Congress.

Sincerely,



Philip D. Guerin
President