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

Submitted via email on 11-28-2023: MassDEP.npdes@mass.gov

Submitted via email on 11-28-2023: barden.michele@epa.gov

Dear Ms. Barden and Ms. Golden:

The Town of Needham ("Needham") 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), 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 they are finalized, Needham 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 if set forth herein, and also to write separately to articulate and highlight issues of particular concern to our community.

As an initial matter, Needham 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 communities like Needham. The extent of these burdens is unknown at this time because it appears that EPA and MassDEP have not conducted any cost-benefit analysis of this new requirement. Needham 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 also 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.

Needham has other significant concerns with the Draft Permit discussed in detail below. In particular, the Draft Permit and State Permit inappropriately regulate communities like Needham as co-permittees and have failed to define their obligations with adequate clarity. As the Advisory Board has commented, unless EPA and MassDEP clarify the communities' and MWRA's responsibilities, the DITP's permit could upset the longstanding and successful relationship among MWRA and the communities.

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 Needham and other towns 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." Draft Permit Part I.E.2.(e)(2).

This requirement imposes new obligations on Needham's resources and its capital planning process. The Draft Permit also gives Needham insufficient time to complete its plan. 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 entirely to justify this new set of obligations.

A. EPA Failed to Evaluate the Costs that Needham and Other Communities Will Bear.

Complying with the Major Events Planning Provisions will impose substantial costs on Needham. 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 substantial personnel time and the engagement of outside consultants. These costs could pale in comparison to the potential capital costs that Needham may incur in order to implement mitigation measures that could even require relocating existing facilities or building new ones.

The associated financial burdens on communities like Needham are unknown but certain to be substantial. Needham will need to assess whether it must hire more staff or engage consultants to comply with the Major Events Planning Provisions. Based on its planning efforts, Needham may then have to modify its capital plans and budget for resiliency projects. These additional costs will ultimately impact other parts of Needham's budget.

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

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

The Major Events Planning Provisions provide Needham 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 Needham and its peer communities only 12 months to accomplish these tasks, which is insufficient to (a) retain the necessary staff or consultants and (b) complete the tasks required by the Draft Permit.

If EPA and MassDEP insist on including the Major Events Planning Provisions, the agencies must provide Needham and other communities a reasonable deadline to complete this major undertaking. Any final permit should allow the communities at least thirty-six months to develop and begin implementing major storm and flood events plans.

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

Before requiring Needham 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 NPDES permit that is limited to governing specific discharges over a five-year term.

D. EPA and MassDEP Failed to Justify These Planning Requirements.

In addition to the foregoing issues, Needham 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 adequately explain the basis for requiring them. 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 explanation falls short of what EPA's regulations require, but it at least provides *some* indication of EPA's views. MassDEP, by contrast, did not discuss the Major

[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 Needham 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).

Events Planning Provisions in its Supplemental Fact Sheet. If Needham 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.

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.

II. THE DRAFT PERMIT IMPERMISSIBLY INCLUDES SANITARY SEWER COMMUNITIES AS CO-PERMITTEES.

As the Advisory Board has emphasized in its comments, for the first time, EPA and MassDEP are attempting to regulate Needham and thirty-eight other sanitary sewer communities under DITP's permit. This radical change to these communities' regulatory obligations exceeds both agencies' respective authorities and threatens to disrupt the longstanding relationships between MWRA and the communities it serves. The agencies have also sought to impose this new regime without Needham's consent by unlawfully waiving their permit application requirements.

In addition, MassDEP has provided no explanation at all for its decision to regulate the Co-permittees under the State 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 but has provided none in the Supplemental Fact Sheet for including these Co-Permittees in the State Permit. 314 CMR 2.05(3)(c). In order for Needham to have an adequate opportunity to comment on the State Permit, MassDEP should explain its reasons and open a new comment period.

A. Neither EPA nor MassDEP Has Jurisdiction to Regulate Communities Like Needham.

1. The Federal Draft Permit

The Draft Permit's inclusion of Needham as Co-permittee exceeds the EPA's authority under the NPDES program. Under the CWA, EPA may only regulate "the discharge of [a] pollutant." 33 U.S.C. § 1311(a). 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. Unless its sanitary sewer system adds a pollutant to navigable waters, Needham is "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.").

Needham's sanitary sewer system adds no pollutants to navigable waters. As EPA concedes in the Fact Sheet, it only adds pollutants to MWRA's treatment works. 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 downstream from Needham's sewers, when DITP discharges treated effluent from Outfall T01.[3]

EPA rules reinforce 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* ...." 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.

2. The State Permit

For the reasons set forth above, MassDEP regulation of Needham and the other Co-permittees in the State Permit is inconsistent with the regulations governing Surface Water Discharge Permits. The Surface Water Discharge Permit regulations, like the CWA, generally impose the requirement to obtain a permit on 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." 314 CMR 3.02.

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 make clear is not a discharge that requires a permit.

B. Communities like Needham are not part of the Deer Island Publicly-Owned Treatment Works.

1. The Federal Draft Permit

EPA cannot cure its lack of jurisdiction by adding Needham and other sanitary sewer communities in with the larger publicly-owned treatment works (POTW) that includes DITP

[3] The Region's assertion that a sewer system's 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).

authorized under the Draft Permit.[4] 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); *see also id.* (referring to "*the* municipality ... which has jurisdiction over Indirect Discharges to and discharges from such a treatment works." (emphasis added). The definition's use of the singular means that a POTW can only be owned by a single municipal entity, such that Needham's sewer system cannot be part of same POTW as DITP.

EPA's 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 contradicts and cannot be reconciled with its own regulations.

2. The State Permit

MassDEP similarly cannot deem Needham's sewer system part of the same POTW as DITP under its permitting regulations. Like their federal counterpart, the Surface Water Discharge Permit regulations 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. Needham Has Not Submitted An Application To EPA or MassDEP, and Neither Agency Has Authority To Waive The Requirement To Do So.

Needham did not submit a permit application to either EPA or MassDEP. Even if the agencies could regulate the Co-permittees in DITP's permit, issuance of a permit to a community that never submitted a permit application 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 a permit application from Needham, EPA cannot issue a permit imposing conditions on Needham.

EPA cannot avoid this problem by waiving application requirements. *See* Fact Sheet 12, 21. EPA's March 8, 2023 letter to Needham claimed that 40 C.F.R. § 121.21(j) authorized the Region to waive permit application requirements in their entirety. *See* Attachment X. 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).

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[4]*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.").

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 Needham's obligation to submit an application.

MassDEP similarly violated its regulations by seeking to regulate Needham in the State Permit without having received a permit application from Needham. 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 "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."). Nothing in MassDEP's regulations offer the department *any* authority to waive permit application requirements. This framework dictates that MassDEP cannot issue a permit that regulates Needham because Needham has not submitted an application for a Surface Water Discharge Permit.

III. The Draft Permit Fails to Define with Sufficient Clarity the Relative Responsibilities of MWRA, CSO-Responsible Co-Permittees and Co-Permittees.

Even if EPA and MassDEP could lawfully structure DITP's permit to include Needham and other communities, 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 cover page and Part I.E.2 must be revised to provide the communities and MWRA with absolute clarity that the communities are not responsible for MWRA's 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.

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.[5] Under its governing 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 the communities liable for MWRA's conduct—or vice versa—could threaten that relationship. Accordingly, Needham supports the Advisory Board's proposed revisions to the Draft Permit's language that the Board submitted with its comments.

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[5] *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].").

IV. Conclusion

Needham appreciates the opportunity to comment on the Draft Permit and State Permit. Please feel free to contact Michael J. Retzky, from the Needham Department of Public Works' Water, Sewer & Drain Division (Superintendent) if you have any questions or would like to arrange a meeting to discuss the resolution of the issues raised above.

Respectfully Submitted,

Kate Fitzpatrick
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Town of Needham, Massachusetts

Cc: Christopher Heep, Town Counsel
Carys Lustig, Director of Public Works
Thomas Ryder, Town Engineer