UPPER BLACKSTONE CLEAN WATER

Stewardship Through Science

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RE: Comments on MA0103284, Massachusetts Water Resource Authority (MWRA) Deer Island 2023 Draft Permit

To Whom It May Concern:

Upper Blackstone Clean Water appreciates the opportunity to provide comments on the subject draft NPDES permit. All our Upper Blackstone staff are dedicated to environmental stewardship and specifically to providing treatment that protects air quality, water quality, and public health through compliance with all our environmental permitting requirements. We take these permit requirements seriously, as we also enjoy all the health and recreational benefits that result from the work we do to protect water quality.

**Comments on Operation and Maintenance of the Wastewater Treatment Facility**

Upper Blackstone believes that the requirements for Major Storm and Flood Events Plans for the WWTF (Draft Permit Part I.E.1.a. (pages 32-34) and, separately, for sewer collection systems (Draft Permit Part I.E.2.(e)(2)(pages 35-45), are overly burdensome and beyond the appropriate scope for a NPDES permit renewal. We request that these provisions be removed from the final permit, since EPA lacks authority to impose them under the Clean Water Act (CWA).

Under the CWA, the Agency can regulate discharges to waters of the United States, but it is not allowed to specify the means by which a facility achieves the discharge levels that EPA specifies. This principle has been stated clearly by the court – for instance, by the D.C. Circuit in the *AISI v. EPA* case, where the Court held that the CWA does not permit "meddling inside a facility":

> [B]y authorizing the EPA to impose effluent limitations only at the point source, the Congress clearly intended to allow the permittee to choose its own control strategy. By imposing water quality based standards upon internal facility waste streams, the EPA seeks to deprive the individual permittee of the ability to choose between a control system that meets the point — source WQBEL by means of point source controls and a control system that meets the point source WQBEL by means of internal waste stream purification. As we have just seen, however, the statute does not permit this sort of meddling inside a facility.

*AISI v. EPA*, 115 F.3d 979, 996 (D.C. Cir. 1997). The CWA's NPDES program regulates discharges, not the facility (or facilities) that discharge. See *Natural Res. Def. Council, Inc. v. EPA,* 859 F.2d 156, 170 (D.C. Cir. 1988) (EPA "is powerless to impose [NPDES] permit conditions unrelated to the discharge itself" and EPA cannot "transmogrify its obligation to regulate discharges into a mandate to regulate the plants or facilities themselves.").

In trying to justify requiring Major Storm and Flood Events Plans in NPDES permits, EPA mentions the goals of the CWA. However, citing to the goals of the CWA does not give the Agency legal authority; those general goals can only be implemented through the specific sections of the CWA that give EPA authority to regulate in particular circumstances, and none of those sections provide EPA with authority to dictate how a facility addresses floods and major storm events.

EPA also argues that the part of its regulations that requires facilities to operate and maintain their systems properly gives the Agency authority to require preparation of Major Flood and Storm Events Plans. However, that part of the regulations is very general. EPA has implemented that regulation, for over 40 years, by including general language in the "boilerplate" sections of permits – language that reproduces verbatim the language of the "O&M regulation." That is a far cry from the very detailed requirements set forth in the Major Flood and Storm Events Plan provisions of the draft MWRA permit.[1]

The U.S. Supreme Court has recently made it clear that when an agency claims new regulatory authority that reflects a "major policy decision," that action triggers the "major questions doctrine," which requires that the agency show "clear congressional authorization" for the new authority that it is claiming. West Virginia v. EPA (U.S., June 30, 2022) - 20-1530 West Virginia v. EPA (06/30/2022) (supremecourt.gov) . Here, EPA's only argument in support of it having new authority appears to be based on a recent amendment to the CWA that created funding for certain actions by municipalities. EPA claims that by enacting that funding program, Congress indicated that the focus of the CWA went beyond actual discharges to the realm of planning for emergencies. But the fact that Congress created a funding program for those actions actually cuts against EPA's claim of regulatory authority. If Congress wanted to give EPA authority to regulate flood and storm event planning by municipal facilities, it could easily have done so. But it did not. Instead, it only gave EPA authority to provide funding for those efforts. We support EPA providing such funding, but the Agency cannot bootstrap that new program to fund voluntary planning efforts into somehow becoming a grant of new authority for EPA to require major new planning efforts, and to dictate how those plans must be developed. That authority simply does not exist.

Beyond the lack of legal authority, the proposed Major Flood and Storm Events Plan requirements in the draft MWRA permit have a number of other serious, specific problems. Those problems include: the unrealistic timeline for developing the plan; the need for frequent updates based on new information; the requirement to utilize a 100-year planning horizon; the requirement to use "at a minimum, worst case data;" the security risks of having to provide the Plan (including GIS information) to the public; the need for a "qualified person" to sign off on the Plan; and the lack of credit for other planning efforts that the municipality may have already undertaken that accomplish many of the same goals as are contained in the EPA Plan requirements.

We understand that in other permits that have recently been issued, EPA has modified the Plan requirements (now embodied in an Adaptation Plan provision) to address many of these concerns. We commend the Agency for taking stakeholder concerns seriously, and for being willing to make significant changes in its permit requirements. At a minimum, those changes should be included in all draft and final municipal permits that are issued in Massachusetts by EPA going forward. And for those permits that have been issued in draft form using the original Major Flood and Storm Events Plan provisions, EPA should issue new draft permits for public comment with the Adaptation Plan provisions

[1] Moreover, the proposed requirements do not constitute proper O&M actions. They relate to planning and preparation for a possible discharge of an unidentified pollutant in the future. Also, a plan itself cannot ensure compliance with water quality standards or other CWA requirements.

included instead.

But EPA should also recognize that the changes made do not entirely address the concerns that have been raised as to these planning requirements. The Agency itself has stated (in the Fact Sheet for the final Westfield permit) that the changes made are not major: "EPA notes that while there have been several organizational changes and other edits to further clarify the three components of the Adaptation Plan, the framework proposed in the Draft Permit is maintained." Major changes continue to be needed in that framework in order to reach an end result that is within EPA's legal authority under the CWA, without leading to overly burdensome and costly planning that does not benefit water quality.

Moreover, the goals of the proposed requirements can be better met with a different approach. Wastewater utilities in Massachusetts are required to conduct facilities planning to gain approval for plant modification projects from MassDEP. Indeed, it is not practical in Massachusetts to access federal or state infrastructure funds for wastewater projects without participating in the state's Clean Water State Revolving Fund (CWSRF) funding process. The CWSRF program has several planning and asset management requirements that it puts on all applicants for funding. If an entity wants to gain access to funding, they must adhere to the program's planning requirements. This helps ensure that the projects to be constructed are the right projects and the best use of funds. It is most appropriate to confirm and address vulnerabilities at the same time as plant modification projects are planned and designed. A review of a plant hydraulic profile, which takes into account water elevations during extreme storms, as well as a siting assessment including current flood mapping or proposed mapping changes is part of any responsible professional engineering design plan for wastewater infrastructure. Including updated climate and resiliency requirements in the CWSRF process would also provide a potential avenue to make such projects eligible for funding, and to incorporate those costs into the overall project costs and municipal appropriations around the upgrades.[2]

If the proposed Major Storm and Flood Events Plan requirements were to remain in the Deer Island final permit or any other NPDES permit, it is doubtful that any permittee in Massachusetts would even consider preparing a Major Storm and Flood Events Plan as described without the assistance of a consultant. Therefore, the time required to budget and appropriate funds for such work, as well as to complete a required procurement process need to be included in any timeframe in addition to the actual study time. It would likely take several years to complete the full process and therefore the 12 month timeframe in the draft permit needs to be increased.

As part of our comments, we also request that an example of a completed WWTF Major Storm and Flood Events Plan that is consistent with the detailed requirements outlined at Draft Permit Part I.E.1.a.(1) – (3) (pages 32-34), for a similarly sized wastewater utility, be provided as part of the response to comments. It is unclear if the examples of the use of the CREAT tool that are included with the EPA guidance for Adaptation planning are meant to represent an example of what is required to be in full compliance with a permit. We note the CREAT case studies show that each facility used assistance from EPA staff or other partners during their planning process, thus the need to hire technical consultants to complete planning work. We repeat herein a request for an example of a fully compliant WWTF Major Storm and Flood Events Plan. We believe that herein lies one of the problems with these requirements; that they are subjective and leave the permittee open to criticism of non-compliance, and arbitrary and inconsistent enforcement and third-party challenges.

**Comments on Combining CSO permits with the Deer Island Treatment Plant (DITP)**

Upper Blackstone believes that the combining of requirements for the 4 combined CSO treatment facilities, with 5 outfalls, within the (DITP) permit for discharges to Massachusetts Bay complicates compliance with the permit requirements. (Draft Permit Part I.B.(pages. 15 – 30). Individual NPDES permits (Boston Water and Sewer Commission (BWSC)) (MA0101192), Cambridge (MA0101974), Chelsea (MA0101877), and Somerville (MA0101982)) are in place

[2] In contrast, the planning mandates in the draft permit, which specify requirements but no funding, raise significant environmental justice (EJ) issues. By requiring municipal permittees to comply with plan conditions and find funding for plans, EPA shifts the cost to ratepayers, which include EJ communities; EPA should better engage EJ communities on this issue.

for these discharges. Without adequate explanation or justification, EPA would have "All applicable CSO requirements from the individual permits . . . be incorporated into the Draft Permit." (Fact Sheet, page 128 of 195). EPA explains only that the inclusion implements a "general practice is to integrate treatment plant and connected CSO authorizations into a single permit" (Fact Sheet pages 109, 128), but without documentation or prior examples of this claimed practice. We are aware of none. Instead, where different municipalities operate the treatment plant and combined sewers, CSO's have historically operated under an individual NPDES permit. We do not believe there is any benefit that outweighs the confusion created and suggest EPA retain the existing permits for these facilities. These CSO facilities are substantially different types of operations with different requirements that have been addressed with their own independent permit in the past, and should continue to do so. This consolidation is not appropriate as CSO facility operation is sufficiently unique from the DITP operation and the reasons for consolidating cited previously, for example in the case of the small or medium sized treatment facilities into a general permit, do not apply in this case. All the parties are forced to do is parse through the single document and pull out the provisions for each CSO facility to manage separately; this can only lead to misunderstanding and confusion.

**Comments on the designation of certain Massachusetts municipalities as Co-permittees**

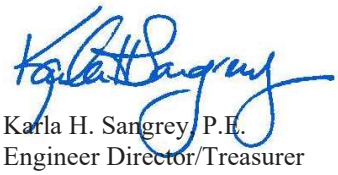
Upper Blackstone maintains that EPA and MassDEP lack, and have not satisfactorily demonstrated in previous responses, the authority to include Massachusetts municipalities as co-permittees as part of this NPDES permit (and MassDEP's Surface Water Discharge Permit) (Draft Permit, pages 1 & 2, and throughout) and asks that the co-permittee requirements be removed. The co-permittee communities do not operate facilities that discharge into the receiving water body. The most fundamental requirement and basis for regulation under the CWA is "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. The designated co-permittees "own and operate collections systems that convey flows to the DITP for treatment." (Fact Sheet, page 12 of 195). These sanitary sewer systems add no pollutants to navigable waters. The only addition of pollutants to navigable waters occurs downstream from the designed thirty-nine (39) municipalities when DITP discharges treated effluent from Outfall T01 into Massachusetts Bay. (Fact Sheet, page 23 of 195). While EPA contends that the collection systems are part of the POTW and therefore should be permitted as such, EPA is inconsistent in application of this assertion in practice as well as geographically across the country, while making their claims based on the same enabling CWA that governs nationally. That inconsistency is also an ongoing inequitable application of the law. If collection systems should be permitted as dischargers than there should be an example where a community that operates a collection system with no discharge to a water body, but only to a POTW, and has been issued its own stand alone discharge permit. To our knowledge there is no such example because you can not have it both ways: a collection system operator cannot be both a component of a POTW requiring it to be issued an NPDES permit and simultaneously not qualify to have its own discharge permit. Clearly the co-permittee has no need to apply for an NPDES permit, and no failure to apply that requires a waiver, as there is no discharge to a water body covered under the Act. In addition to the above, the confusion of liability created by the inclusion of co-permittees will not aid in the cooperation among member communities and the MWRA to operate and maintain this infrastructure; it will in fact redirect resources to legal arguments with no resulting environmental benefit. The improvements to the overall MWRA service achieved through coordination among communities and the MWRA are noted in the fact sheet and demonstrate there is no such need for this added co-permittee confusion.

**Comments on the designation of CSO-Responsible Co-permittees**

Upper Blackstone believes that EPA lacks the authority for the designation of CSO-Responsible Co-permittees. (Draft Permit, pages 1 & 2, and throughout). In addition to the comments above regarding co-permittees, we add here that CSO facilities obviously discharge to a water body that can and is permitted under the CWA. The collection systems that discharge to a CSO facility rather than a water body do not have any need to obtain an NPDES permit for the same reasons as a collection system that discharges to a conventional WWTF do not require an NPDES permit.

Thank you for your consideration of our comments. If you have any questions, please do not hesitate to call me at (508) 755-1286.

Very truly yours,
UPPER BLACKSTONE CLEAN WATER



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