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June 5, 2023

Michele Duspiva
U.S. Environmental Protection Agency – Region 1
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Boston, MA 02109-3912

Submitted via electronic mail: duspiva.michele@epa.gov

Re: NACWA Comment on the U.S. Environmental Protection Agency Region 1's Draft National Pollutant Discharge Elimination System Permit for the Holyoke Pollution Control Facility (Permit MA0101630)

Dear Ms. Duspiva:

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to provide comments to the U.S. Environmental Protection Agency (EPA) Region 1's draft Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit issued to the Holyoke Pollution Control Facility (MA0101630) in Holyoke, Massachusetts. NACWA's members have significant concerns with the currently drafted language that must be addressed before EPA Region 1 issues any final permits.

NACWA represents the interests of over 350 municipal clean water utilities of all sizes across the United States including six municipal wastewater utilities in Massachusetts. Our members are anchor institutions in their communities that everyday provide essential service of treating billions of gallons of our nation's wastewater and stormwater in a manner that ensures the continued protection of public health and the environment. This includes taking various voluntary steps to improve their overall resiliency.

Many NACWA members are experiencing increased intensity of storm events and flooding, and they take the potential impacts of those events on their communities very seriously. As all levels of government become more involved in climate resiliency efforts, clean water utilities are often at the forefront of protecting critical infrastructure to ensure that our nation's wastewater and stormwater systems will reliably provide vital human health and environmental services to their communities everyday.

NACWA's members have also already invested billions of dollars to reduce their own climate footprints through a variety of methods, including rebuilding their aging infrastructure and moving from traditional "gray" infrastructure to more climate friendly "green" practices, transitioning from traditional, demanding fossil fuel energy sources to self-sustaining energy production via biogas generation, and repurposing the tons of nutrient rich municipally derived biosolids as sustainable fertilizers.

Despite these efforts at adaptation and mitigation, unfortunately, the novel and overly prescriptive operation and maintenance (O&M) requirements which EPA included in the draft permits not only imply that clean water utilities are not taking climate resiliency seriously, but also presume that it is EPA's role in administering the NPDES program to require utilities to purportedly prepare for storm events now or a century from now. This is simply untrue.

Wastewater utilities already consider their susceptibility to natural disasters and other emergencies as part of their routine planning. Such planning requires extensive local knowledge and regional expertise and coordination, and is achieved both voluntarily and through other programs. The "one-sized-fits-all" NPDES program – which is designed solely to address existing, specific point source discharges into navigable waters – is not an appropriate tool to accomplish many of these resiliency goals.

In addition to it not being an appropriately tailored tool, EPA also does not have authority under the NPDES program to require utilities to undertake activities which are wholly divorced from any actual discharges into "waters of the United States," or even any existing water quality concerns. Clean water utilities are keenly aware of the potentially devastating impacts climate change may have decades and even centuries from now on the systems they are responsible for successfully running every day. But the 5-year permit they receive governing their current effluent discharges from those systems is not the vehicle through which long-term advanced mitigation plans can or should be mandated.

In light of the fact that EPA issues permits directly for Massachusetts, NACWA is also concerned that the unnecessary, costly, and unlawful "Wastewater Treatment Facility Major Storm and Flood Events Plan" and "Sewer System Major Storm and Flood Events Plan" requirements proposed for utilities in the draft permits could serve as a problematic precedent for other NPDES permits issued by state regulatory authorities throughout the country.

Frustratingly, there was no advanced notice of these prescriptive requirements until they appeared in these draft permits issued to a handful of small POTWs in Massachusetts. Such provisions have, to NACWA's knowledge, never been included in any utility NPDES permit before, and, troublingly, it appears that EPA Region 1 is testing them in the context of small-to-medium sized utilities that are not especially at risk to catastrophic storm and flooding events.

It will take every level of government—federal, state, and local—working together to tackle the infrastructure challenges climate change will inevitably bring to municipalities nationwide. The lack of advanced notice and discussion with clean water agencies prior to proposing to mandate these onerous requirements on small communities through a permitting program that has never been—and should not be—used to address them is antithetical to the establishment of the cooperative relationships that will be critical to ensuring successful environmental outcomes in the years to come.

For the reasons outlined below, NACWA asks that EPA Region 1 remove these provisions prior to finalizing the proposed permits, and to instead engage with meaningful dialogue with all interested stakeholders about climate mitigation efforts going forward.

The Draft Permit's "Operations and Maintenance" Provisions Exceed EPA's Statutory Authority

Public clean water agencies take climate change, natural disasters, flooding, and other emergencies into account as important components of their routine planning. Addressing these issues often involves not only major infrastructure investments, but also regional coordination among multiple local, state, and federal agencies and utilities. EPA's fiat that individual wastewater utilities develop and implement major storm and flood event plans spanning the next 100 years in the context of an NPDES permit is not only irrational, it exceeds the Agency's statutory authority under the CWA.

The CWA provides EPA with authority over the "discharge of a pollutant" by "any person" from any "point source" to a "navigable water." See 33 U.S.C. §§ 1311(a), 1342. While this authority is broad, "there must be an actual discharge into navigable waters to trigger the CWA's requirements and the EPA's authority." *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 751 (5th Cir. 2011). In other words, "EPA [may] regulate through the NPDES permitting system...only the discharge of pollutants," not a source's activities generally. *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 504 (2d Cir. 2005).

Requirements in a permit that is only valid for 5 years which force a utility to plan for and address hypothetical scenarios 20-30 and even 80-100 years out on their face violate the plain language of the CWA. What actual discharge of a pollutant from a point source into a navigable water that is being authorized by the proposed permit is being addressed by such requirements? The draft permit unsurprisingly does not attempt to tie such requirements to an actual discharge; foreseeing the impacts that effluent coming out of a pipe 100 years from now may have on a receiving waterbody is impossible.

In defense of these provisions, EPA Region 1 points to its own regulations at 40 CFR § 122.41(d), which imposes a "duty to mitigate," that requires permittees to "take all reasonable steps to minimize or prevent any discharge in violation of the permit that has a reasonable likelihood of adversely affecting human health or the environment." Setting aside reasonableness for the moment, again NACWA asks, what "discharge in violation" of a permit whose term is statutorily limited to five years is occurring 100 years from now?[1]

Region 1's reliance on 40 CFR § 122.41(e) provides little additional justification. That provision requires permittees to "properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of the permit" (emphasis added). Yet, EPA Region 1 has failed to point to even one express condition of the permit which will be served by these onerous provisions.

Specifically, NACWA questions what effluent limitations—either technology- or water quality-based—the proposed requirements are intended to protect. Under CWA § 301(b)(1), NPDES permits for clean water utilities must include effluent limits based upon secondary treatment technology, which are in no way related to these flooding and resiliency plans. Presumably, then, EPA Region 1 considers these

[1] NACWA notes that the CWA itself only came into being a little over 50 years ago.

requirements to be necessary to achieve water quality-based effluent limitations, but it has failed to identify a single limitation that might be violated if these extensive provisions are not carried out.

NACWA does not dispute that EPA has authority to impose tailored requirements necessary to ensure that specific discharges do not exceed relevant, identified technology-based limits or those related to the water quality condition of a receiving waterbody. But that authority does not extend to the imposition of wide-ranging, costly, and infeasible mandates to predict and guard against any hypothetical worst-case flooding or disaster event under the guise of routine "operation and maintenance."

Nor can EPA's regulations be read outside of the statutory authority upon which they are based. Setting aside the glaring issue of not being tied to any discharge actually being authorized by the permit, which is required even by EPA's own regulations, the proposed requirements also exceed EPA's general authority to regulate discharges into navigable waters, as such authority does not extend into a permittee's operations. Region 1 appears to take the position that, under the umbrella of requiring proper "operations and maintenance" of a facility with a point source discharge, it can regulate anything and everything about that facility, including how it manages asset vulnerabilities, where and how it stores records and equipment, and how it should identify potential funding sources for resiliency projects.

While NACWA reiterates that clean water agencies take all of these considerations seriously as part of sound utility management practices, they frankly have little to do with what EPA actually has authority over pursuant to the NPDES program: the effluent discharges flowing from a facility's pipes into navigable waters.

As the U.S. Court of Appeals for the Eighth Circuit has held, "effluent limitations are restricted to regulations governing 'discharges from point sources into navigable waters.' 33 U.S.C. § 1362(11). The EPA is authorized to administer more stringent 'water quality related effluent limitations,' but the CWA is clear that the object of these limitations is still the 'discharges of pollutants from a point source.' 33 U.S.C. § 1312(a). In turn, 'discharge of pollutant' refers to the 'addition of any pollutant to navigable waters.' § 1362(11)."

Although the overall goal of increasing resiliency of the nation's infrastructure in the face of a changing climate is laudable—and one which NACWA's members are constantly pursuing – the text of the CWA is clear. The goal of the NPDES program—which is also quite laudable, and central to the protection of human health and the environment—is the regulation of point source discharges of pollutants into "waters of the United States." The strict liability regime long enforced by EPA and authorized state agencies through the CWA's NPDES provisions must be applied to what they were expressly designed for. EPA Region 1 should adhere to the limits of the NPDES program, and instead allow utilities to address the complex issues surrounding climate change and resiliency comprehensively and in the proper forums.

The Draft Permit Conflicts with the CWA Section 402(k) "Permit Shield"

The legal limits placed on the scope of EPA's authority under the NPDES program exist for good reason. NPDES permits impose stringent and costly requirements on utilities that both EPA and citizen

groups are authorized to enforce. It is therefore incumbent that they be clear and reasonable and provide utilities with certainty.

CWA Section 402(k), the so-called "permit shield" provision, provides important protections for NPDES permit holders by stipulating that compliance with an NPDES permit constitutes compliance with the CWA itself. Courts have interpreted Section 402(k) to mean that, once an NPDES permit is "final," the permit holder must be able to rely on it as the touchstone for its compliance with the CWA. The U.S. Supreme Court summarized the "permit shield" this way: its purpose is to "insulate 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, Sec. 402(k) serves the purpose of giving permits finality." E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977).

An amorphous requirement that mitigation plans pertaining to climate change projections 80-100 years out be constantly modified "as data sources used for such evaluations are revised or generated" flies in the face of the "finality" Section 402(k) affords permittees. Far from outlining clear obligations for a utility over the length of a permit's term such that the utility can know and plan for the full extent of its CWA obligations at the time of a permit's issuance, such a requirement instead injects extreme uncertainty for utilities, particularly given the ever-evolving literature surrounding climate science.

Perhaps even more troublingly, the requirement to modify plans as new data emerges appears to open the door for outside groups to constantly seek to substitute their own "climate science" for that relied upon by a utility. Citizens are more limited in their ability to enforce the CWA; they may only target permit holders that "discharges pollutants in excess of the levels specified in the permit," or otherwise fail to comply with a permit's conditions. *Natural Resources Defense Council v. City of Los Angeles*, 725 F.3d 1194, 1204 (9th Cir. 2013). Though, as noted above, the proposed mitigation provisions have no relevance to authorized pollutant discharges, the imposition of a duty to modify the plans based on new available information as a condition of the permit seems almost tailored to provide an opportunity for unwarranted citizen suits.

Public funds should be spent on projects that have been determined through public, transparent processes to provide the greatest benefits to a community. They should not be wasted on costly litigation caused by inappropriate and amorphous permitting language. EPA Region 1 should remove the proposed operations and maintenance requirements in accordance with CWA Section 402(k).

The Draft Permit's Requirements Are Unreasonable, Arbitrary, and Unlawful

Under the Administrative Procedure Act (APA), agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" must be set aside. 5 U.S.C. § 706(2)(A). Moreover, the regulations upon which EPA Region 1 relies for its imposition of the permit's burdensome operations and maintenance provisions require only that "reasonable steps" be taken.

Even assuming for the sake of argument that EPA Region 1 does have the general authority under the CWA to impose the proposed operations and maintenance requirements, they must nevertheless meet these standards. But the costly and onerous provisions in the proposed permit do not; they are unreasonable, arbitrary and capricious.

The costs of developing the proposed plans, which EPA Region 1 did not consider, will be significant, and a 12-month period is simply not long enough to procure the professional engineering and technical services which would be required to develop such plans. Moreover, the plans would require utilities to make public sensitive data that could lead to malicious actors targeting utility infrastructure.

It is also unreasonable to ask utilities to speculate about potential events 100 years from now. As EPA itself once stated in defense of Massachusetts' development of a total maximum daily load (TMDL), a party "can hardly be faulted for refraining from guessing about [climate change] impacts...particularly when...[it] cannot provide any meaningful analysis of whether—and certainly, how—climate change will alter" particular water quality conditions. *Conservation Law Foundation v. EPA*, EPA Memorandum in Support of Defendants' Motion for Summary Judgement (Filed September 21, 2012).

As noted above, utilities treat resiliency planning and mitigation as a central part of comprehensive utility management. However, EPA Region 1 should not require utilities to take these costly and unreasonable steps in the context of NPDES permitting in the manner proposed. Asking utilities to predict their own vulnerabilities—and the weather—100 years from now in publicly available permitting processes, and to constantly modify those predictions over the course of the permit's term despite the fact that those predictions have nothing to do with what is actually being permitted, is the definition of arbitrary and unreasonable.

The Major Storm and Flood Events Plan is Overly Prescriptive with Impracticable Requirements and Unachievable Timelines

Overly Prescriptive and Confusing Asks

NACWA believes these requirements are overly prescriptive and unduly burdensome. The draft permit asks municipal utilities in the permit and in various footnotes to investigate and navigate through a wide variety of climate resources that often have variable projections.

Climate projections well out into the distant future (e.g., 2100) are highly variable and likely to change as more data accumulates and in response to global efforts to mitigate greenhouse gases. The requirement to develop a flood events plan and mitigation measures for 80-100 years in the future also ignores that adaptation planning for the extremes of climate change possible in 2100 and beyond requires iterative collaboration between the surrounding municipalities.

The decisions a permittee makes to protect against extreme sea level rise, for example, are directly related to the measures taken by the entire region. Even the case studies cited by the latest National Climate Assessment by the U.S. Global Change Research Program (USGCRP), and that EPA's permit points to as a resource, are community and regionally-based (*e.g.,* Norfolk, VA), and not specific to an individual utility. This demonstrates the need for a comprehensive approach to climate resiliency and not something any one utility can achieve singlehandedly through a permit.

Further, the permit asks an undefined "qualified person" to sleuth through and evaluate vulnerabilities from every year the permittee has operated the utility to 80-100 years into the future. They are to evaluate "at a minimum, worst-case data", a phrase which is unclear on its face in terms of what qualifies as worst case.

NPDES permits are issued every five years. The draft permit requires permittees to plan and take steps to mitigate 80-100 years, well beyond the expected life of many wastewater assets. NACWA believes these long-term planning requirements are outside the scope of the NPDES permitting program.

Unreasonably Short Compliance Time Period

As currently written, the proposed permit language places overly prescriptive requirements on POTWs with obligations to *develop* a plan documenting the significant number of climate possibilities, both short and long-term, that could impact a POTW's operation *and begin implementing* mitigation measures quickly. The Wastewater Treatment Facility Major Storm and Flood Events and the Sewer System Major Storm and Flood Events plan both include requirements for POTWs to assess its asset vulnerabilities, its systemic asset vulnerabilities, and a develop comprehensive mitigation alternatives analysis *within 12 months* of the permit being finalized, and these documents must be updated every 5 years. If assets change, the utility must continually re-evaluate and revisit their vulnerabilities in tandem with upgrades.

Further, the permittee and co-permittees are jointly required to *develop* a plan that looks at the individual sewer system-related assets and assess vulnerabilities, conduct a systemic vulnerability evaluation of the individual system and develop an alternatives analysis, *and begin implementing* mitigation measures within 12 months.

Clean water utilities, regardless of size, will need more than 12 months to plan *and implement* plans of this granularity and magnitude. If EPA insists on including these requirements in the final permits, utilities should be afforded more time to implement. NACWA proposes EPA give utilities at least 36 months to complete both the Wastewater Treatment Facility Major Storm Flood Events Plan and the Sewer System Major Storm and Flood Events Plan.

Significant Cost Burdens to Implement

NACWA has serious concerns with the amount of money a clean water utility would have to spend on preparing the Waste Treatment Facility Major Storm and Flood Events Plan and a Sewer System Major Storm and Flood Events Plan, not to mention updating them when a change is made or at the turn of a permit cycle as well as potentially defending any legal challenge. The investment to do this type of work—hundreds if not thousands of hours of staff time and significant financially resource allocation—will take from the ever-shrinking amount of funding available that could have been used to invest in more pertinent critical infrastructure and mitigate actual water quality impairment of concern to a community in the first place. Further, the significant costs incurred will be passed on to ratepayers, which will be felt by the most vulnerable populations within a community.

Significantly, EPA Region 1 has not assessed the cost burdens this would place on municipal clean water utilities. Few utilities are likely to have the in-house expertise and experience, let alone resources, to expend on this type of excessive climate forecasting and planning. The fact that EPA Region 1 is slipping this novel language into permits for smaller utilities for the first time is even more disturbing, as the Region surely knows quite well that these communities likely don't have the resources or staffing to address these new requirements.

Many clean water utilities are already pouring billions of limited ratepayer dollars into repairing and rebuilding aging sewer and stormwater infrastructure to improve water quality in their communities. NACWA urges EPA, before issuing final permits, to provide the regulated community and the public with a formal cost-benefit analysis and calculate the cost burden on municipal utilities to meet these new requirements. Permittees and the public should have the opportunity to weigh the net environmental and public health benefits of a climate planning mandate versus the benefits that will be deferred or delayed for other water quality improvement projects.

EPA Region 1 Failed to Consider Community Risks, Vulnerabilities and Security Sensitivities

NACWA strongly urges EPA Region 1 to remove the requirement to make sewer system "map[s] available online in a downloadable Geographic Information System (GIS) format, available to the public, in a manner where the system's performance can be independently assessed and analyzed." This requirement to publish sensitive information online is well beyond the traditional O&M responsibilities of a POTW and would place municipally owned utilities—that are critical infrastructure themselves—at a greater risk of an attack from bad actors with malicious intents than the minimal benefits of having maps widely virtually available.

The inclusion of such a requirement demonstrates EPA Region 1's failure to fully consider the community risks of publishing vulnerable assets in a forward-facing public manner, especially given the rising concerns over cybersecurity. NACWA recommends this sensitive information remain secure and not be published online for anyone to access and rather made available by request.

Recommendation: EPA Must Consider Major Storm and Flood Event Plans Outside of the NPDES Permitting Program

The Major Storm and Flood Events Plan and Sewer System Major Storm and Flood Events Plans are a novel approach, certainly for municipal wastewater utilities and for the Clean Water Act NPDES program itself. NACWA believes that a less onerous approach outside and separate from the NPDES permitting program would be more effective.

Other programs, such as the Clean Water State Revolving Fund (CWSRF), require utilities seeking low interest financing loans to develop an asset management program which includes many of the requirements to forecast and plan for climate resiliency. NACWA believes mechanisms such as the CWSRF are meaningful ways to obtain similar information and simultaneously have a utility assess its climate resiliency that do not carry the same compliance and enforcement weight.

If drafting and implementing local climate resiliency plans are part of EPA's broader climate mitigation and adaptation strategies, EPA should provide the funding to local communities to construct comprehensive climate impact and resiliency plans for extreme weather events rather than force a mandate to individual permittees to accomplish on their own. Alternatively, EPA could do this work themselves with the authority they have to conduct their own risk assessments. NACWA urges EPA, if they intend to move forward with climate and resiliency efforts, to do so outside of the NPDES permitting program.

Conclusion

For the reasons outlined above, NACWA asks that EPA Region 1 remove these provisions prior to finalizing the proposed permits, and to instead engage with meaningful dialogue with all interested stakeholders about climate mitigation efforts going forward. If there are questions regarding these comments, please contact Amanda Aspatore, NACWA's General Counsel at aaspatore@nacwa.org or Emily Remmel, NACWA's Director of Regulatory Affairs at eremmel@nacwa.org.

Sincerely,

Adam Krantz
Chief Executive Officer
NACWA

cc:

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