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November 8, 2021

Attn: Sewage Notification
MassDEP
One Winter Street, 5th Floor
Boston, MA 02108

Submitted via e-mail to massdep.npdes@mass.gov

RE: Proposed Regulation 314 CMR 16.00 Notification Requirements to Promote Public Awareness of Sewage Pollution

To Whom It May Concern:

The Massachusetts Coalition for Water Resources Stewardship (MCWRS) appreciates the opportunity to provide comments on proposed regulation 314 CMR 16.00 *Notification Requirements to Promote Public Awareness of Sewage Pollution.*

MCWRS is a non-profit, membership organization which advocates for municipal interests in areas related to wastewater, stormwater and drinking water. MCWRS members include municipalities, water and wastewater districts, authorities and commissions, stormwater coalitions, consulting engineering firms and legal firms. MCWRS advocates for programs, regulatory approaches and legislation that advances the triple bottom line perspective to achieve environmental improvements using fiscally sound means that support improved quality of life for residents of the Commonwealth of Massachusetts.

Please accept the following comments on the proposed regulation 314 CMR 16.00 Notification Requirements to Promote Public Awareness of Sewage Pollution. The proposed regulation is a requirement of An Act Promoting Awareness of Sewage Pollution in Public Waters and would establish requirements and procedures for notifying the public of sewage discharges and overflows into surface waters of the Commonwealth to protect and preserve public health. In general,

- This regulation should be applicable to CSO communities only as originally intended, not all wastewater utilities throughout the Commonwealth.
- If NPDES permit requirements are achieved through an engineered diversion of flow, notification should not be required.
- The effective date of the regulation should not precede the date on which the law takes effect.
- Communication and notification protocols should be streamlined through MassDEP website, with more reasonable time periods established that are commensurate with potential risk.

Detailed comments are as follows:

1. **16.01** - It seems peculiar that various sections of these regulations take effect at different times. Are there other examples of DEP regulations with such variability in effective dates? The entirety of 314 CMR 16.00 was the result of legislation that culminated in Chapter 322 of the Acts of 2020 - An Act Promoting Awareness of Sewage Pollution in Public Waters. That statute established two (2) effective dates: 1 year after passage of the Act for MassDEP to promulgate regulations and 540 days after passage for the actual law to take effect. Those statutory effective dates lead to a deadline of January 12, 2022 for MassDEP to finalize regulations and July 6, 2022 for the actual law to take effect. It would appear the legislature's intent was for MassDEP to finalize its rules by January so that effected entities could have about six months to plan for and budget for an implementation process that would begin on or about July 1, 2022. A reasonable person would assume that regulations written to implement a law would not take effect until the law takes effect. The Act only stipulated that MassDEP have regulations promulgated within one year of passage, not that regulations were to be in effect prior to the law being in effect.

   There is an enormous amount of planning, procurement, coordination and financing that will be needed for communities and wastewater districts to come into compliance with this new rule. But that cannot start until final regulations are before us so we know exactly what is mandated. Communities and districts will have to begin planning for compliance actions immediately once the regulations are adopted, but it is improper for MassDEP to mandate compliance (i.e., February 1, 2022 CSO Notification Plan submittal) five months before the authorizing law takes effect.

2. **16.02** - Several definitions need to be reworded:
   a. **Blended Wastewater**: Are only wastewater plants receiving flows from combined sewer systems impacted by these regulations relative to blending? Does a plant with no combined sewer input that blends not have the opportunity for a less burdensome notification requirement? Also, the purpose of blending as stated in the proposed regulations is incorrect. The primary purpose of blending is to protect the plant's secondary treatment process from washout caused by high flows in wet weather. Blending helps to assure the integrity of the treatment process during and after major wet weather events and therefor is protective of the receiving water. This critical message is nowhere mentioned in the proposed regulation or the Act itself, leaving advocates, legislators and the general public misinformed.
   b. **Combined Public Advisory Notice**: This definition should have more flexible language that allows a permittee to propose alternate approaches that are system specific.
   c. **Combined Sewer Overflow**: Should note that CSOs are listed in the permittee's NPDES permit and allowed under the Clean Water Act.
   d. **Diversion**: Change to "an engineered redirection of wastewater flows…"
   e. **Partially Treated**: To be consistent with the purpose of the proposed regulation and the Act, which is to protect and preserve public health, the definition should be revised to indicate that a flow that is conveyed around some treatment processes is only considered partially treated if it is not predicted to meet health based NPDES effluent limits. NPDES permits include a host of effluent limits for many parameters, not all of which have bearing on public health. For instance, during a severe wet weather event the pH limits may not be met due to high rainfall. There are no public health repercussions if the pH falls to 6.3 instead of the required minimum of 6.5, yet that would technically be a NPDES permit exceedance. The key parameter to be considered, and the one that has driven this notification process, is bacteria (E. coli). Meeting effluent limits for bacteria should be the indicator of NPDES permit compliance for purposes of defining partial treatment.
   f. The final sentence in this paragraph, beginning with "Notwithstanding the foregoing…", makes no sense. Why would a treatment works designed to only treat combined sewer flows prior to discharge through a permitted CSO be automatically deemed partial treatment? Does it not depend on the nature of the treatment technology and the results of the treatment? If a permittee wishes to invest in a treatment facility to treat CSOs to a high level that produces effluent during wet weather that is better quality than that of the receiving water and that meets water

quality standards for wet weather conditions, why would MassDEP want to discourage that by deeming it partial treatment no matter what it produces? Overall, these regulations give permittees no credit for having constructed and operated CSO treatment facilities.

3. **16.03(1)(c)(d)(e)** - The inclusion of sanitary sewer overflows in these proposed regulations is unfair to communities and districts with non-combined sewer collection systems who have not been included in pre-regulatory or even pre-legislative discussions on the subject. To date, this notification initiative has been focused on combined sewer overflows. The 19 combined sewer systems in Massachusetts have been invited to various sidebars with MassDEP and legislative groups regarding the notification rules, yet the hundreds of sanitary sewer systems and wastewater treatment plants not associated with combined sewers have been shut out of the process and, except for the work of MCWRS and MAWEA, probably have no knowledge of these pending regulations. These regulations should focus exclusively on CSOs, not SSOs, which are already reported to DEP. Where DEP deems an SSO to be of significance they already can and do mandate notification to key, potentially impacted parties. The inclusion of SSOs is also inconsistent with Chapter 322 of the Acts of 2020. That authorizing legislation requires a public advisory when there is a discharge from a permittee's outfall and defines an outfall as an outlet **designed** for the purpose of allowing a discharge that is part of or connected to a combined sewer system, sanitary sewer system or treatment works. 16.03(1) (d) and (e) describes SSOs requiring public notification that do not involve a discharge from an outfall as defined in the statute or proposed regulation. A wet weather SSO from a surcharged sanitary sewer does not discharge from an outfall, it comes out of a failed pipe or manhole, which is not an outfall designed for a discharge. Furthermore, as they are not designed as controlled discharge structures, there are obviously no real-time monitoring (or metering) systems designed to identify such events An SSO from a pump station or force main failure also would not involve an outfall as defined. Only 16.03(1)(c) might involve an outfall but examples of a "wastewater outfall" have not been identified.

4. **16.03(2)** - See comment 2(e) regarding meeting NPDES limits being only in relation to health-based parameters such as bacteria and not all effluent limits.

5. **16.04(1)** - The proposed regulations identify metering as the only or preferred means of discovery of a discharge requiring notification. This directive overstates the value of metering and fails to note the many flaws inherent in wastewater metering. While the proposed regulations do allow a permittee to make a case for an alternate approach the language at 16.04(1) should be changed to say, "A permittee shall utilize appropriate technology to determine or discover…" and leave it to the permittee to describe what they intend to use as part of their CSO notification plan.

6. **16.04(5)(a)(1)** - The presumption that a CSO has occurred if the permittee is unable to confirm a discharge within the allotted timeframe from a meter communication seems unreasonable and will lead to unnecessary public notifications. A permittee may promptly respond to a meter communication but in the 2–4-hour window may not be able to determine whether the meter malfunctioned, a rather common occurrence in wastewater settings, or whether a CSO occurred. Keep in mind that weather events that cause CSOs also cause localized flooding and a host of other operating conditions that may require immediate attention from the same staff that would otherwise be responsible for investigating the CSO and issuing a public notification. This is generally the rule, not the exception. Granting 2-4 hours to figure out what is happening in a system with multiple CSOs will not be enough time. Perhaps the permittee's CSO Notification Plan can indicate the timeframes that might work based on system specific conditions and suggest plans to improve upon those timeframes over subsequent years.

7. **16.04(5)(b)** - As noted in comment 3, these regulations should not apply to SSOs. If SSO notifications are to be required, the presumption that an SSO discharge has been discovered and confirmed within 4 hours of being informed is unreasonable. In the case of SSOs, where metering, modelling or other technologies do not reasonably exist for detecting these

discharges, the proposed regulations suggest that a report of a discharge made by **any person** triggers a 4-hour timeframe during which the permittee must confirm the SSO. If unable to confirm in that timeframe, then the SSO is presumed and public notification proceeds. It is quite routine that the public will report a sewage discharge which turns out to be stormwater, a water main/service leak, groundwater breakout or someone having dumped liquid waste (e.g., washwater, paint) on the side of the road. Actual SSOs may also be for very short durations. The language reads, "If a permittee is unable to confirm…discharge…occurred within the timeframe established herein, it shall presume that a discharge or overflow has been discovered." Unable to confirm in the timeframe could mean that the permittee failed to respond to investigate the report of the SSO within 4 hours. It could also mean that the permittee responded quickly (well within 4 hours) but was unable to confirm the SSO because there was no evidence of an SSO or that the SSO report was erroneous (not an SSO at all). As written, this section states that reports of an SSO need to be verified within 4 hours or they are presumed to have occurred. It does not give any direction if the SSO report is not confirmed because upon investigation no evidence of an SSO was found. Given that the SSO notification requirement applies to wet weather SSOs, which occur during rain events when street or other localized flooding may occur and sewer system staff may be extremely busy, a 4-hour window to investigate a claim made by a passerby is not adequate. It is suggested that permittees be given 8 hours to respond to a report of an SSO from the public and then, to the extent practicable given conditions at the time, attempt to verify whether an SSO has occurred within 4 hours of the response time. Faster response times would be expected based on the nature of the original report (massive sinkhole with sewage flowing out versus water bubbling from a manhole during a downpour) and who identified and reported the discharge (experienced system operator, health dept. staff versus passerby).

8. **16.04(5)(c)** - Blended wastewater meeting NPDES permit limits should not require any notification (see comment 12). However, if a blending notice is required only health based NPDES limit exceedances should be considered when determining eligibility for the blending notice. See comment 2(e).

9. **16.04(8)** - The proposed regulation and the authorizing law require notification within 2 hours of a discharge ceasing, unless DEP requires otherwise. It would be appreciated if DEP would give wide latitude on this requirement. CSOs often start and stop multiple times during a storm. It is to no one's benefit to have permittees issuing start and stop notifications repeatedly during a rain event. In fact, any potential benefit is lost when otherwise interested parties determine such routine notices are a nuisance. Through the CSO notification plan, permittees should be given the opportunity to determine how to define the end of a discharge and then issue the 2-hour notice at that time and not every time a discharge stops intermittently.

10. **16.04(10)** - Relative to translations of notifications and signage into multiple languages, would the option to include a multi-language "note" on the notification or signage stating, "This is important information, please request translation if needed," be sufficient? This approach has been used for other health-related notifications. With the amount of information required, having multiple languages will make signage and notifications unwieldy. Signage in particular may become too large for the locations and require multiple permits from local authorities. As noted in the recent hearings, signage is prone to vandalism and unusually large signs will be easy targets for vandals adding another cost to the notification program.

11. **16.05** - The proposed regulations do not address situations where the wastewater treatment plant is not responsible for and does not have a combined sewer system. The permittee with a combined sewer system may be the community with a collection system but not the wastewater treatment plant whose facility only encompasses the treatment plant. The website requirements apply to the permittee with the combined sewer system, but this section then covers blended wastewater which would be the jurisdiction of the wastewater treatment plant. Language in this section needs to be clarified to address these different jurisdictions.

12. **16.05(f)** - The requirement for any notification of a discharge of blended wastewater remains puzzling. Per the regulatory definitions, blended wastewater that meets NPDES permit limits is not considered partially treated. Therefore, the discharge of blended wastewater does not meet the statutory or regulatory definition of a discharge and would not be subject to notification under the law. The difficulty with notification of blended wastewater discharges is that the message will be misunderstood as a newly activated public health threat. As this is not the case, there is no point in providing such notification. As an alternative, if the interest is simply public education, each wastewater treatment plant that practices blending, which is expected to meet NPDES permit limits, could post a standing section on its website that explains blending, describes how and why it is done and provides a sense of the frequency of occurrence for that facility based on historical data and the circumstances under which blending may occur. Rather than a notification for each event, the public would learn of this treatment methodology every time they check the website and would be given enough information to make an informed decision about the likely risk. It educates and informs but does not misinform the public.

13. **16.06 - CSO Public Notification Plans** - The deadline for submission of a detailed CSO Public Notification Plan is highly inadequate. The regulations will not be finalized until January 2022 leaving just a few weeks for permittees to put the plans together. While DEP would like permittees to begin working on these plans now, few will take that initiative given that the regulation could change. Even if work began today that would only leave 3 months to complete the plans, months that include the holiday season and winter, when staff availability will be limited and snow and ice management, which often falls upon the same staff, will further restrict availability. The plan as detailed takes up two pages of the 14-page proposed regulation. That alone suggests it is very prescriptive and quite detailed. Many permittees will need to hire outside help to craft the plan. As this new and unexpected requirement falls in the middle of the fiscal year for most, it was not included in budgets, which will make compliance even more difficult.

    The requirement for permittees to develop a plan is supported. It is the best way forward to give permittees some flexibility in crafting their approach to notification and making clear what should be expected. However, developing that plan with the substantial amount of background work needed will easily take six months to one year to complete. With the plan requirements so clearly laid out in the proposed regulation, the need for a public comment period to allow third party review is unnecessary. DEP should be able to review a plan submittal and determine whether it is adequate to meet the regulations. In that regard, these regulations need to include a process by which plans modified by DEP can be challenged or appealed.

14. As required in **Chapter 322 of the Acts of 2020, Section 1(i)**, DEP is supposed to establish on its website a clearinghouse of discharge notifications, including posting current discharges within 24 hours. Having a central point for public access to such information would be much more useful than having individual websites for each permittee. If an individual wants to recreate on a river, they could go to one site (DEP) to find out which river might be least risky. It also allows for the more casual reviewer to be provided with a uniform format and message.

15. Has DEP performed any cost impact analysis of the proposed regulation on local governments? The list of required actions mandated by this regulation (and the authorizing law) is quite extensive and will lead to expenditures to cover staffing needs, consultant services, signage, website development, metering and monitoring equipment and maintenance and health department activities. The regulations especially target communities with combined sewers, which are generally among the poorest cities in the Commonwealth. If a cost impact analysis has been conducted, DEP should post the study and its findings on its website before finalizing these regulations.

As a general comment, advocates and some legislators are under the notion that notification rules will lead to public outcry demanding the elimination of combined sewer systems in the Commonwealth. They also believe that this outcry will include a call to fund the billions of dollars needed to make this happen and that Congress or Beacon Hill will open the coffers to accommodate this

plea. A more pragmatic and realistic outlook is that the public outcry driven by the notification rule will lead to increased confusion and misunderstandings as to the design and historic operation of wastewater utilities, and a need for massive sewer rate increases in affected communities to pay for the work needed to "eliminate CSOs." This, in turn, will lead to even greater outcry about local costs for sewer service and the needed rate hikes will not happen. At the end of it all, the notification rule will not lead to cleaner rivers but will result in more people being convinced that our rivers are too polluted to recreate in, despite Massachusetts rivers being the cleanest they have been in over 200 years. These people will take their kayaks and watercraft elsewhere and the burgeoning river recreation scene in our state will rapidly disappear. In the words of a former DEP Drinking Water Program Director, "be careful what you ask for."

Please contact me at guerinp@worcesterma.gov if you have any questions.

Sincerely,

Philip D. Guerin
President & Chairman