

MassDEP Promulgation of Regulations (314 CMR 16.00)
“An Act Promoting Awareness of Sewage in Public Waters”

Response to Comments

Background

In January 2021, Governor Baker signed into law *An Act Promoting Awareness of Sewage in Public Waters* (“the Act”). The law directs MassDEP to promulgate these regulations pursuant to the authority of the Massachusetts Clean Waters Act, M.G.L. c. 21, §§ 26-53, including but not limited to Sections 27 and 43A, and Section 2 of Chapter 322 of the Acts of 2020. The purpose of the law is to inform the public when untreated or partially treated sewage flows into Massachusetts surface waters. This includes discharges known as Combined Sewer Overflows (CSOs) and Sanitary Sewer Overflows (SSOs).

SUMMARY OF PUBLIC COMMENTS AND MASSDEP RESPONSES

MassDEP issued a Public Hearing Notice and released a public comment draft of the regulations on October 4, 2021. MassDEP held two public hearings on October 27, 2021, at which MassDEP provided information sessions about the regulations and received oral testimony from stakeholders. The public comment period closed on November 8, 2021. MassDEP received 46 written comment letters and 16 people provided oral testimony at the public hearings. Commenters included environmental advocacy groups, state legislators, wastewater treatment plant operators, trade organizations, and municipal boards of health.

The following sections summarize public comments and MassDEP responses.

Events Requiring Notification

Notifications for Blended Wastewater

The majority of commenters addressed MassDEP’s requirements for “blended” wastewater. Below is a summary of the most frequent comments regarding MassDEP’s proposal to require “blended wastewater notification” by posting notice of blending events to the permittee’s website rather than issuing public advisory notification for the practice of blending.

- MassDEP should clarify that blending protects the treatment plant by avoiding wash out of the biological system; blending is not used to reduce CSOs; it is to preserve secondary treatment.
- Blending discharges that meet permit limits should not require any notification.
- MassDEP should remove exemption for blended wastewater. Blended wastewater should be considered partially treated and discharges should require full notification.

MassDEP Response

MassDEP concurs that blending wastewater at treatment plants minimizes the risk to the secondary treatment process biota by avoiding high flow conditions that can wash out the biomass that is central to the secondary treatment process. EPA’s Nine Minimum Control Measures require maximization of flows to treatment plants during high flow events, which helps to minimize discharges from CSOs. It is MassDEP’s opinion that blending achieves two objectives: preserving treatment plant biota and reducing CSO discharges.

Discharges of blended wastewater typically precede or coincide with CSO discharges as operators start to react to increases in flow being received by the plant from systems with combined sewer flows. Discharges of blended wastewater occur at permitted wastewater treatment plant outfalls separate from CSO outfalls, and potentially pose different risks to different user groups, possibly in different water bodies. Discharges of blended wastewater can be longer in duration than CSO discharges in many instances (*i.e.*, hours vs. minutes), though the treatment provided to blended wastewater will exceed that of any treatment provided at CSO discharge points. Volumes of CSO discharges and blended wastewater discharges will vary. MassDEP conducted analyses of blending events and determined that, of the blending events analyzed, the total flow of blended wastewater at most facilities where blending occurs is less than 1% of total flows, contrary to comments indicating it may be as much as 90%.

The draft regulations proposed that releases of blended wastewater that meet permit effluent limits, should be required to post blended wastewater notification to the permittee's website, rather than provide public advisory notification. Commenters argued that higher loads of solids in blended wastewater can break apart after discharge and release bacteria, which may impair the disinfection process and pose additional risk to public health.

The majority of commenters asserted that MassDEP's proposal not to require full public advisory notification for blending events was contrary to the legislative intent, and that the regulations should be revised to require full public advisory notification for blended wastewater. MassDEP received comment directly from sponsors of the bill expressing that blending events were intentionally viewed as a type of partially treated wastewater subject to the law, and public advisory notification was intended to be required of discharges of blended wastewater. After review of all comments received, MassDEP has revised the regulations to identify blended wastewater as a type of partially treated wastewater that is subject to the law and regulations and requires public advisory notifications and public health warnings, when applicable.

Notifications for SSOs

The Department has received comments on which SSO events should require a public advisory notification:

- Any SSO that discharges either directly or indirectly to a surface water of the Commonwealth should require notification.
- The regulation should be applicable to CSO communities only. The inclusion of SSOs in the proposed regulations is unfair to communities and districts that have not been included in pre-regulatory or pre-legislative discussions on the subject.
- Including SSOs is inconsistent with the statute. A wet weather SSO from a surcharged sanitary sewer system does not discharge from an outfall, it comes out of a failed pipe or manhole, which is not an "outfall" designed for a discharge.
- SSO notification requirements in the draft regulations are confusing. Do they apply to all sewer systems regardless of whether they are CSO permittees? Do all SSOs have to be reported or just those that discharge through wastewater outfalls? Do the notification requirements apply also to SSO discharges to stormwater outfalls?

MassDEP Response

SSO events required to notify under 314 CMR 16.00 are:

- Any Sanitary Sewer Overflow that discharges through a wastewater outfall, either directly or indirectly, to a surface water of the Commonwealth. This is a direct requirement of the law enacted.
- In addition to those SSOs above, Mass DEP has included a requirement for public advisory notifications for the following SSO events, which are not considered to be discharges from an “outfall”, but also have significant public health risks, and hence are consistent with the goals of the law:
 - Any SSO that flows into a surface water of the Commonwealth and is the result of the sanitary sewer system surcharging under high flow conditions when peak flows cannot be conveyed to a wastewater treatment plant due to capacity constraints. These generally occur under wet weather conditions.
 - Any SSO that flows into a surface water of the Commonwealth and is the result of a failure of a wastewater pump station or associated force main designed to convey peak flows of 1 million gallons per day or greater.

In support of this approach, MassDEP reviewed the database of SSO events in the northeast region, their causes, and their associated discharge volumes. For capacity related SSO events noted above, these SSOs often coincide with large wet weather events where (separate) sewer systems surcharge due to high infiltration and inflow into their collection system or into the regional sewer interceptor system; the duration and volume of these type of SSOs can be similar to CSO discharges, and their occurrence is often at known low points in the collection system. Another category of SSO events requiring a public advisory notification in the regulations is failure at a major pump station. Many pump station failures or alarm events can be managed by the sewer authority by prompt deployment of backup power facilities, or use of pumper trucks, but events occurring at a major pump station create conditions which may result in more sustained SSO events which may pose a significant public health risk.

MassDEP notes that all sewer systems are vulnerable to SSO events. However, in a large number of cases, these events are short duration, low volume events, some of which never reach a surface water. The causes of such events can be sewer system blockages or breaks. MassDEP, in its final regulations, has targeted SSO events more likely to have public health risks, and thus which warrant the additional public health advisories and public health warnings in 314 CMR 16.00.

If a sewer system has an event (as listed above) it would be required to issue a public advisory notification. Other SSO events that discharge to stormwater outfalls or do not fit into the categories above do not need to notify under 314 CMR 16.00 but still need to report under 314 CMR 12.00.

Clarification of Events Requiring Notification

MassDEP received comments requesting clarification on the events that would require public advisory notifications.

- The definition of partially treated should be revised to clarify that for facilities that utilize seasonal treatment, such as seasonal disinfection, their effluent is not considered partially treated if they are operating their treatment in compliance with their NPDES and surface water discharge permits.
- The regulations should clarify whether they would be applicable to situations where a system only bypasses tertiary treatment.

MassDEP Response

MassDEP agrees with these requests for clarification and has addressed them by revising the definition for partially treated to clarify that whenever a permittee's NPDES and Surface Water Discharge Permits require only seasonal disinfection, that effluent from facilities utilizing seasonal treatment is not considered partially treated provided that the facility is operating in compliance with its discharge permits. MassDEP has determined that bypassing tertiary treatment would be considered to be partially treated.

Public Advisory Notification Requirements

Methods of Detection

MassDEP received a number of comments on the methods to be used by dischargers to detect a discharge event:

- 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.
- It should be left to the permittee to describe what method they intend to use as part of their CSO public notification plan.
- There are numerous devices and sensors designed to physically monitor and measure flows in a CSO, and new technologies are always being developed. The term "metering" should be defined within the regulations, and its meaning expanded to allow use of other "monitoring" and "sensor" devices.
- MassDEP should clarify if model runs or the use of a calibrated collection system model is an acceptable method to determine when a discharge occurs at an outfall and that the use of a model or model tool does not require approval of the Commissioner.

MassDEP Response

The law prescribes use of metering as the primary method of detecting a discharge:

...."If an outfall will not have metering equipment to detect and transmit reliable information about a discharge within the timeframes established by subsections (c) and (d), the permittee shall apply to the commissioner for authorization to use another method."

MassDEP regulations are consistent with this provision of the law and establish metering as the preferred method of detecting a discharge. With regard to the use of the term "metering" in the final regulations, MassDEP has not incorporated a formal regulatory definition. However, MassDEP acknowledges that the term can be applicable to an array of monitoring devices, sensors, or other devices that are deployed remotely in the system with the capacity to yield accurate and timely information on sewer system conditions, which is essential to make determinations if a discharge is occurring or has occurred, and also to provide information leading to reasonable estimates of discharge volume. The permittee's CSO or SSO notification plan can and should describe the use of this type of equipment, where such devices will be relied upon to meet the requirements of the regulations.

As commenters have noted, MassDEP also acknowledges that meters need proper maintenance to be kept in proper working order, and that, even with such maintenance, there will be occasions where

meters transmit inaccurate information. MassDEP has seen instances where meters have transmitted “false positives” for a discharge which was not occurring. For this reason, review of meter data prior to issuing a public advisory notification as an element of the “discovery” process, is warranted. The permittee’s CSO Notification Plan will need to describe the procedures used to confirm a discharge event, and provide for proper operation and maintenance of the meters.

The regulations do not prohibit using modeling as a method to detect discharges, however they do establish that use of models will require an authorization by the Commissioner. Such an approach will need to be described in detail in the permittee’s CSO or SSO notification plan. While in some cases there will be sophisticated and reasonably accurate sewer system models developed, use of these models may be complicated by the required timeframes for discovery and for issuing a public advisory notification, and will also need to be provided with input data, such as rainfall, to make reasonable determinations on discharge detection and ensuing discharge volumes. MassDEP will review the merits of each such proposal individually to ensure that the methodology used will serve to comply with the regulations.

Discovery

MassDEP received comments on the issue of “discovery” of a CSO discharge, and the time and resources needed to carry out this task.

- The criteria for notification should be changed from “*after discovery*” to “*after the start*”. Two hours is enough time to automatically detect the start of an overflow and send out notices. This will ensure the operator keeps the detection equipment operating properly.
- A requirement to discover discharges within 4 hours would have staffing impacts and require overtime staffing in some cases.
- Confirming that the discharge happened within the 2-hour (24/7 staffed) or 4-hour requirement will prove difficult. Some CSO sites are complicated in that tide or river levels play a major factor as to whether a small, large, or no event took place during the identical rainfall durations, intensities, and require much more rigorous data analysis.
- Discovery time should be 24 hours instead of 2 to 4 hours to allow staff time to QA/QC data, ensure meters are operating properly, and complete necessary field work.
- The presumption that a CSO has occurred if the permittee is unable to confirm a discharge within the allotted timeframe seems unreasonable and will lead to unnecessary public advisory notifications.
- The presumption that an SSO has been discovered and confirmed within 4 hours is unreasonable. This should be increased to 8 hours and notification should be within 12 hours.
- Does the 4-hour discovery period also apply to partially treated wastewater?
- Discovery based on modeling should also be held to the two-hour rule. Permittees utilizing modeling should detail in their CSO notification plans how they will determine when a discharge occurs at an outfall.

MassDEP Response

The Act provides that “[a]s soon as possible, but no later than 2 hours after the **discovery of a discharge from the permittee’s outfall, a permittee shall issue a public advisory...**” (emphasis added). MassDEP’s regulations are consistent with the law in that regard, and also establish important parameters around the time allotted for discovery depending on the nature of the discharge.

Discovery is not defined in the law; however, it is a critical component of any public advisory program. The principle behind allowing time for “discovery” is to afford permittees a short but important amount of time to confirm (or not) that a discharge has occurred. There have been instances in the past involving current notification programs when a metering device has issued a false alert, as noted above, which was then quickly disseminated without further review. This resulted in beach closure when, in fact, no discharge occurred, thus unnecessarily alarming resource users or even precluding resource use without basis. MassDEP’s regulations are intended to allow permittees a short period of time to investigate and confirm that a discharge has occurred and that a public advisory notification is required. Affording permittees sufficient time to discover or confirm whether a discharge has occurred will improve the accuracy of the reporting and not compromise the goals of the public advisory program.

In defining “discovery” timeframes for discharges requiring public advisory notifications, MassDEP is attempting to strike a balance between efforts needed to ensure and confirm that the “discharge” in fact occurred or is occurring, and the need for issuing timely public advisory notifications. In defining discovery timeframes in the regulations, MassDEP has considered a range of factors: technologies available to provide timely alerts; the performance and effectiveness of current public notification programs; activities and associated staffing needs to confirm discharge events; and the central goal of the regulation, which is to provide timely and accurate public notification of discharges.

MassDEP acknowledges that CSOs, SSOs, and discharges of partially treated wastewater can and do occur on days and times which present challenges for permittees attempting to confirm on a timely basis that a discharge has occurred and to issue the required notification. While many CSO permittees have 24/7 staffing, smaller wastewater treatment plants and sewer system authorities may not have such staffing. However, even under shorter staffing conditions, either an alert notification or report of a discharge event warrants prompt attention, and response actions can and must satisfy the regulatory provisions for discovery and public notification.

In implementing existing public notification programs, permittees have taken a number of approaches to providing timely response actions and public notifications, including:

- Developing standard operating procedures with assigned responsibilities;
- Increasing staffing when there are higher risks of a discharge occurring (*e.g.*, significant wet weather events or storms with risk of power loss);
- Utilizing contract services for operating/maintaining metering systems, scrutinizing meter data, and providing public notice; and
- Forgoing a confirmation effort if time or other resource needs preclude that task, and proceeding directly to notification.

Since each permittee has different resources and risks of discharges, permittees should carefully develop their own plan for compliance.

After review of the comments received, MassDEP has not changed the discovery timeframes included in the draft regulations, for a number of reasons:

- CSOs are at known locations, where information is most often provided through metering transmitted quickly, or calibrated sewer system models;
- The SSO discharges requiring public advisory notifications are at major pump stations that are subject to daily inspections and alarming, or are the result of capacity constraints, which often occur at the same location (low points) in the collection system during wet weather conditions;

- Management approaches, such as those noted above, are available to efficiently undertake discovery actions; The CSO and SSO events requiring public notification are the ones most likely to pose public health risks and warrant prompt attention; and
- MassDEP has clarified that public advisory notification for partially treated wastewater must commence within 2 hours of the commencement of bypassing of a portion of the treatment process, because a treatment plant operator will be aware of the commencement of bypassing.

Reporting Volume of Discharges

MassDEP received numerous comments on the issue of estimating CSO volumes, highlighting in some cases the difficulties in making such estimates on a real-time basis, and the importance of establishing CSO volumes to inform the public of the extent of the potential impact:

- MassDEP should require that wastewater treatment plants post volumes as soon as possible, maybe when they notify that the event has ended.
- CSO volumes are difficult to quantify. Three-year average data is misleading and does a disservice to the public.
- Volume should be removed from public advisory, and occurrence and duration should be adequate.
- Permittees should only be required to provide volumes in its monthly reporting to MassDEP.
- MassDEP should provide guidance so all CSO communities are calculating the estimated volume in the same way.
- Volume reports from modeling as well as actual metered flow rates should be required in addition to the extrapolation from prior years.

MassDEP Response

The Act requires the reporting of CSO volumes in the Public Advisory Notification and some estimate of CSO volume will be needed. MassDEP acknowledges that CSO volumes can vary dramatically, and generally depend on the depth, duration, and intensity of rainfall events. MassDEP considers properly operating meters, with communication equipment, in CSO regulator structures or outfalls as the most common and most effective method of quantifying CSO activations and volumes. However, even the capacity of these systems to estimate the volumes of a CSO discharge on a real-time basis is limited. This is for many reasons: dynamic conditions are commonly present in CSO regulator structures, where actual CSO flows will be impacted by factors that include: the complexity of the CSO diversion structure(s); the number and types of meters being used; the operational condition of the meter(s); and the presence of tide gates and/or the elevation of the receiving water. In some cases, the discharge will still be active at the time the public advisory notification is issued. All these factors necessitate scrutiny of the meter data upon the conclusion of the discharge event, along with a review of other system information/data (e.g., interceptor levels, rainfall data, and, potentially, on-site inspection observations) to produce a reasonable estimate of the CSO discharge volume.

Notwithstanding these challenges, MassDEP concurs with comments received that both CSO (and SSO) discharges can vary dramatically in duration and volume, and thus in their public health impacts, and advisories will be most beneficial when information on the magnitude of a discharge is provided. Accordingly, both the Act enacted and MassDEP regulations require all public advisories to include ***“estimated volume of the outfall discharge based on the average discharge from data reported to the department for the prior 3 calendar years.”*** The regulations require that the permittee’s CSO

Notification Plan include a review of this historical CSO discharge data, along with review of event-based rainfall data, either as predicted or measured, for the *initial* CSO volume estimate. In some cases, this may be a cursory estimate that will be later revised with more accurate data, but this reporting will give some measure of the expected CSO volume. Whether using meters or not, the methodology to be used by CSO permittees to provide both the initial and final estimate of the volume of CSO discharges will need to be described in the required CSO Notification Plan, and will be subject to public comment and subsequent MassDEP review and approval.

Methods for Issuing Public Advisory Notifications

MassDEP received comments regarding the methods for disseminating public advisory notifications, including:

- Watershed organizations should be included in the list of entities that are required to receive public advisory notifications.
- In addition to text or email, public advisory notifications should also be issued by voice call and through social media.
- Everyone who lives near CSO outfalls should receive notification via snail mail.
- What news organizations are acceptable to MassDEP? Should they be newspaper organizations or broadcast news? MassDEP should either identify the two largest news organizations and news organizations that serve environmental justice communities or state that news organizations will be identified in public notification plans.
- What is meant by “issued” to the news organizations? Will permittees be obligated to pay for publishing or airing the notification? If a news outlet does not publish or air the notification will the permittee be held responsible and subject to enforcement action?
- MassDEP should provide guidance to permittees on how to determine which specific recipients at agencies, boards of health, and news organizations meet the requirement for delivery of notifications.

MassDEP Response

Included in the list of entities to which permittees must issue public advisory notifications is any individual subscribed to receive the message by text or email. As watershed organizations are aware of the Act and regulations, they have the opportunity to subscribe. This is the most inclusive approach, as it may be impractical for either MassDEP or the permittee to identify all the organizations that want to receive notifications.

The Act specifies that the permittee shall issue public advisory notifications by email or text message, and accordingly, the draft regulations also specify email or text message. While MassDEP agrees that social media could be an effective way of notifying additional people, we do not agree that it should be mandated for permittees. At the time a discharge or overflow is occurring, permittees have many responsibilities including making sure their facility is operating properly, taking measures to stop an unauthorized discharge (in the case of an SSO), and issuing required notifications to required agencies and subscribers. Adding requirements for posting on one or more social media outlets adds an additional burden on permittees. Further, use of social media could present cybersecurity concerns with a risk of accounts being hacked. It is MassDEP’s understanding that many advocacy groups already have strong followings on social media. MassDEP suggests that these groups could use their established social media presence to spread the word for individuals to sign up for sewage notifications, or to share notifications that permittees have issued.

The focus of the Act and the draft regulations is to provide timely notifications at the time that discharges and overflows are occurring. Permittees will be required to provide a subscription service for those who are interested in receiving notifications by email or text message. MassDEP understands that not all people living near, or using waterbodies near, CSOs may be aware of the presence of CSO outfalls and, therefore, may not subscribe to such messages. However, using the postal service to disseminate information would not be the most effective way of reaching people. Further, this could be costly and labor intensive for permittees. MassDEP encourages advocacy and environmental justice organizations to help spread the word about sewage notifications to their members and individuals living and traveling to the neighborhoods and watersheds they serve.

Permittees should use their best professional judgment in selecting the news organizations. As the Act and regulations do not specify what type of media, the permittee is given discretion to choose the most appropriate media outlets. MassDEP recommends that permittees work with environmental justice organizations in their communities to identify news organizations that serve environmental justice populations. Permittees should contact the news organizations to identify a person or position to whom they should send notifications. Permittees are not expected to pay to publish a notification, nor will they be held responsible if the news organizations do not publish the notification. The only requirement for the permittee is to provide the notification to the news organizations.

MassDEP can provide guidance on specific contacts to be included for state and federal agencies for the purposes of public advisory notifications. However, each permittee will need to determine the downstream municipalities they will notify and the appropriate contacts for each of those municipalities.

Content of Public Advisory Notifications

MassDEP received comments regarding the content of public advisory notifications, including:

- The amount of information required to be sent via email or text should be reduced and the regulations should specify what information must be included in the initial email or text notification, as opposed to what can be provided on a website.
- MassDEP should include a mechanism to issue retractions or corrections of public advisory notifications that were issued in error.

MassDEP Response

The Act requires that specific information be included in the public advisory notification; thus, MassDEP has limited discretion in reducing the amount of information in the notification. However, MassDEP had added some additional requirements to the information to be included in the draft regulations and does have the ability to reduce those additional requirements. Therefore, the regulations have been revised to reduce the amount of text in the notification to the extent allowed by the statute, and to specify information that should go on the website at the time a notification is issued (see 314 CMR 16.04(3) and (10)).

MassDEP has revised the regulations to require permittees to issue a retraction of a public advisory notification if they become aware that no discharge actually occurred within 48 hours of issuing the public advisory notification.

Timing of Public Advisory Notifications

MassDEP received comments regarding the timing for issuing public advisory notifications, including:

- The requirement to issue public advisory notifications 2 hours after discovery should be seasonal.
- Updates on discharges should be provided after 4 hours instead of 8 hours.
- The requirement for updates every 8 hours is superfluous.
- MassDEP should exercise its regulatory discretion to not require both a notice within two hours of when the discharge ceases and an update every 8 hours if the discharge has not ceased.
- Permittees should be given discretion within their CSO Notification Plan to define when an overflow ceases.
- Allowing up to 24 hours for some permittees to issue public advisory notifications may be acceptable now, but this practice should not continue indefinitely. MassDEP should include a deadline for permittees to improve their systems so they can provide more timely notifications.

MassDEP Response

The Act does not provide MassDEP with discretion to require a different timeline for public advisory notifications, or to eliminate the requirement for notifications on a seasonal basis, so the requirement will remain at 2 hours year-round. Subsection (b) of the Act states that “a permittee shall issue an updated public advisory every 8 hours for an ongoing discharge and within 2 hours when a discharge ceases or is projected to cease, unless the department requires otherwise.” While MassDEP has discretion to change the requirement for the updated advisory to be issued at 8 hours, MassDEP did not find a reason to differ from the statute. However, MassDEP has made a change to the regulations such that if the discharge or overflow ceases before 8 hours, the permittee does not have to issue a notice until 8 hours, at which point the permittee’s notification will either indicate the discharge has ceased or that it is ongoing. In the case of intermittent discharges, this will allow permittees to determine whether the discharge has finally ceased or may recommence during the 8 hour period following initial notification. If the discharge is still ongoing at 8 hours, another update will be required within two hours of when the discharge ceases.

Subsection (g) of the Act states “If the proposed method or the current discharge detection capabilities of the permittee’s outfall will not provide timely or reliable information, the commissioner may extend the time for a permittee to issue a public advisory; provided, that such time shall be extended only as necessary, and by not more than 24 hours after discovery of the discharge. A permittee that has been granted an extension shall make necessary improvements to its outfall, if any, to detect an outfall discharge within the timeframes established pursuant to subsections (c) and (d).” To be consistent with the Act, 314 CMR 16.04(2) states “A permittee that has been granted an extension shall make necessary improvements to its outfall, if any, in the timeframe specified in the Commissioner’s approval, to detect or discover an outfall discharge within the timeframes established in 314 CMR 16.04.” MassDEP will set a deadline for any permittee that has been granted a time extension for making improvements to their infrastructure as soon as is feasible to be able to provide notifications within two hours of discovery of a discharge or overflow. As each permittee’s system is different, the regulations cannot specify a deadline for all permittees; rather a deadline will be established through approval of the permittee’s CSO Public Notification Plan.

Defining Affected Area

Subsection (b) of the Act requires that permittees' public advisory notification describe "waters and land areas affected or expected to be affected by the discharge," and subsection (c) requires that notifications be issued to multiple entities including "any municipality directly impacted by the discharge". Commenters asked for assistance in determining which communities are affected by the discharge.

- MassDEP should provide more guidance on how to identify "municipalities impacted by the discharge" and the associated environmental justice populations requiring notice.
- Affected community is going to be important term to define.

MassDEP Response

The Act directs the permittee to provide public advisory notification to "*...any municipality directly impacted by the discharge...*" Since a discharge or overflow as defined in the regulations, may occur to any surface water of the Commonwealth, defining the area of "impact" could be a very complicated matter, made more complicated by the fact that the majority of reported discharges will likely occur during significant wet weather events, when there will be substantial pollutant loads, including pathogens, contributed by other sources such as stormwater. MassDEP acknowledges the challenges to defining the impact area of the discharge.

MassDEP's expectation is that permittees will use Best Professional Judgment in defining the impact area when making such public advisory notifications:

- For CSO discharges, the approach for defining the impact area should be included in the permittee's CSO Notification Plan, required by 314 CMR 16.06. In nearly all cases, in support of the required Long-Term CSO Control Plan (LTCP), CSO permittees have assessed the receiving water impacts of CSO discharges, in some cases using receiving water models. The information in the LTCP, as well as any water quality assessments or studies, should prove useful in understanding the areas affected by CSO discharges. LTCPs are also required to identify any sensitive use resource areas which could be impacted, such as drinking water intakes, shellfish harvesting areas, swimming resources, and endangered species habitats. These areas should also be targeted for the public advisory notifications and signage in the permittee's CSO Notification Plan.
- For the SSO discharges requiring public advisory notifications under 314 CMR 16.03, these sites may be at known locations where downstream communities and resources can be identified for affected surface waters.
- Where it is documented in implementation of the CSO or SSO Notification Plan that an area of impact is not encompassed in the notification program, MassDEP has authority under 314 CMR 16.06 to require the permittee to address any such deficiencies.

CSO Permittee Website and Signage Requirements

Comments were received on the requirements in the draft regulations for CSO permittees to install permanent signage for CSO outfalls.

- MassDEP should ensure requirements for signage at CSO outfalls do not conflict with requirements in NPDES permits.
- Signs at CSO outfalls should be able to indicate when a discharge is active.
- MassDEP should provide for permittees, the text and universal symbols for signs, translations of text, and example signs.

- MassDEP should allow for the signs to rely more on technology-based tools so that the amount of text required on signs can be reduced.

MassDEP acknowledges that these comments raise important points about the signage requirements, and in response, has revised 314 CMR 16.05 CSO Permittee Website and Signage Requirements to:

- Specify that signs that are already required by NPDES permits will serve the purpose of warning signs at the CSO outfall locations. The signs required under 314 CMR 16.00 will instead be located at public access points potentially affected by the discharges.
- Require that signs follow a template to be provided by MassDEP, and that they be able to provide timely updates about ongoing discharges.
- Indicate that signs must “provide access to translations” instead of “be translated” so that permittees have the ability to direct people to translations of signs through a QR code or website address, thereby reducing the amount of required text on the signs.

Public Notification Plans¹

Timeline for CSO Notification Plans

Comments were received on the Department’s proposal to create CSO Public Notification Plans as a vehicle for receiving information from permittees with CSOs that details each permittee’s public advisory notifications, outreach to environmental justice populations, and identification of methods for detecting activation and estimating volume of CSOs.

- MassDEP should commit to full implementation of the Sewage Notification Law by July 6, 2022, which is 540 days after the law was signed on January 12, 2021.
- The February 1, 2022 deadline for draft CSO notification plan is too soon; permittees will want to see final regulations prior to working on plans.
- 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.
- A proper CSO Public Notification Plan cannot be fully and thoroughly developed within the time frame allowed. A minimum eight-month period after the new regulations are published should be allowed for communities to procure services and develop a public notification plan, due to the complexity of the requirements. Large amounts of capital will have to be expended including professional services, website construction, meter purchase and installation, training and testing of the system, and coordination with other city departments.
- MassDEP should consider a compliance schedule for permittees that cannot meet the July 2022 deadline for implementation of CSO notification plans.
- Is it legal to require CSO notification plan before the provisions of the law go into effect in July 2022?

MassDEP Response

¹ Note to reviewers: The draft regulations referred to CSO Public Notification Plans. MassDEP received comments suggesting requiring SSO Notification Plans, which has been added. The heading changed accordingly to reflect that CSO Notification Plans and SSO Notification Plans are referred to collectively as “Public Notification Plans.” For sake of clarity, MassDEP will refer to the specific type of notification plan in the response to comments document depending on the context.

CSO notification plans were not required by the statute and were proposed by the Department in its draft regulations as a mechanism for permittees to describe in detail the measures in place at each outfall to detect activation and measure the volume of discharge. This approach was devised to provide flexibility for permittees to use available resources and system knowledge to propose the most efficient plan to meet the requirements of the law. Permittees commented that the amount of time proposed in the draft regulations to file the CSO notification plans with the Department was unrealistic, and that permittees would be unable to comply with the timeline. The Department has revised the regulations to provide additional time for submittal of a complete CSO Public Notification Plan.

The timeline has been adjusted to May 1, 2022 for a preliminary submittal of the CSO Public Notification Plan. This will ensure that permittees are ready to meet the regulatory requirements and begin reporting their discharges by July 6, 2022, as required by the statute. By January 12, 2023, permittees will be required to submit a final CSO Public Notification Plan to DEP for approval. It is MassDEP's intention that by revising the schedule, permittees will be able to comply with the new dates. Section one of the Act does not become effective until July 6, 2022, but the Act requires the regulations to be promulgated by January 12, 2022. This lag time between regulatory promulgation and the requirement for compliance with the provisions of the Act allows MassDEP to work with permittees on plans and procedures for ensuring compliance by July 6, 2022.

Additional Comments on CSO Public Notification Plans

MassDEP received additional comments related to CSO Notification Plans:

- Permittees request ability to rebut public and MassDEP comments on final CSO Notification Plan.
- Public notification of CSO discharges is one of EPA's "Nine Minimum Controls Minimum Implementation Levels" in the National Pollutant Discharge Elimination System (NPDES) permits. NPDES permits for CSO communities already require permittees to update their CSO Public Notification Plans. It seems confusing for the permittee to have 2 separate requirements for the same thing. MassDEP should coordinate with EPA, review what already exists based on the current NPDES requirements, and come up with a new proposal that doesn't involve confusion and duplication.

MassDEP Response

Regarding concerns about the permittees' ability to rebut comments on plans, MassDEP intends to have open dialogue and discussion with permittees on the finalization of all CSO Notification Plans.

For any permittees that have already developed CSO public notification plans as a requirement of NPDES permits, MassDEP encourages them to use relevant content from those plans in the development of their CSO Public Notification Plans that are required by 314 CMR 16.00. MassDEP can work with any permittees that need assistance to understand the similarities and differences between the requirements under NPDES permits and 314 CMR 16.00. In the future, MassDEP will work with EPA to refine permit conditions to reduce or eliminate duplication of work by striving to have CSO Public Notification Plans developed under 314 CMR 16.00 meet requirements under NPDES permits.

SSO Notification Plans

Although SSO Notification Plans were not part of MassDEP's proposal, multiple commenters recommended that permittees be required to develop SSO Notification Plans as a mechanism to ensure that permittees are aware of the requirements to issue public advisory notification for some SSO events.

- MassDEP should require SSO Notification Plans for all permittees.
- Without a requirement for a MassDEP-approved SSO Notification Plan, municipalities may fail to comply with this requirement, or compliance may be inconsistent.
- Inadequate notice has been given of the requirements of the regulations to entities that run collection system only systems.

MassDEP Response

MassDEP has considered these comments and has revised the regulations to require SSO Notification Plans for all sewer systems to be submitted on a form to be provided by the Department. Approximately 230 permittees will be subject to this requirement. MassDEP will conduct outreach to the SSO communities to make them aware of this requirement in response to concern that communities that do not have CSOs may be unfamiliar with the requirements of the Sewage Notification Law. MassDEP intends to issue guidance on developing and implementing SSO response plans, which will include measures to address the public notification requirements in 314 CMR 16.00.

- The timeline for submittals will be July 6, 2022 for all sewer systems without a CSO.

Permittee Reporting Requirements

MassDEP received comments regarding the requirement for permittees to report a compilation of data from all discharges and overflows in the previous month on the 15th of each month.

- Reporting data from the previous month does not provide any more useful health information to the public or MassDEP than providing the information in annual reports. The monthly reports should be eliminated.
- Instead of reporting being required every 15th of the month, it should be 30 days after the event. QA/QC of data takes time and accurate information is important.

MassDEP Response

MassDEP's reporting requirements will allow permittees at least two weeks to QA/QC data and this should be sufficient time to complete this work. Given that the volume data provided with public advisory notifications will be estimated based on prior years' data, it is important for both MassDEP and the public to have access to more accurate volume estimates more often than once a year. Further, as NPDES and surface water discharge permits are being renewed, they are including a requirement for permittees to report on CSO volumes monthly, also on the 15th of the month. Therefore, MassDEP's requirement coincides with the timing of a requirement that some CSO permittees are already required to meet, and that all CSO permittees will be required to meet in the future.

Public Health Warnings and Temporary Signage

Public Health Warnings

MassDEP received several comments regarding the frequency of, and methods for local boards of health or health departments to issue public health warnings. Many commentors suggested that such warnings not be required for every public advisory notification event, but only for those that are significant. Some commenters suggested that boards of health should have discretion to decide when to issue public health warnings, and that Reverse 911 calls should not be required. Some commenters suggested that permittees should be responsible for issuing public health warnings rather than permittees. Several commenters expressed concern about the impact of the requirements on Boards of Health and Health Department resources which have already been negatively impacted by pandemic response.

- Several commenters expressed concern about the impact of the requirements on boards of health and health department resources which have already been negatively impacted by pandemic response.
- Public Health Warnings should not be required for every Public Notification event. They should only be required for significant events to prevent residents from unsubscribing or ignoring calls due to notification fatigue.
- The standard for issuing a Public Health Warning should be limited to true emergency situations such as a major/historical flooding events which would impact a larger portion of the population and be more meaningful.
- The requirement does not take into account the length of time a discharge occurs or how much is discharged. The impacts could differ based on these factors.
- Need clarification on what type or volume of event would trigger notification.
- Requiring communities to issue Public Health Warnings in winter months when water bodies aren't being used recreationally would have little, if any, protection of public health.
- Boards of Health should not be responsible for public health warnings; it should be the responsibility of permittees to define the magnitude of events triggering public health warnings in their notification plan with guidance from MassDEP, considering the size of the receiving water.
- Local Boards of Health should be allowed to use discretion in deploying Reverse 911 calls. The statute gives MassDEP discretion over the use of Reverse 911 systems. MassDEP should use that discretion when appropriate, but not in all cases.
- Use of the Reverse 911 system is typically not allowed by wastewater treatment plants unless specific approval is allowed by the local Fire or Police Department. Use of the Reverse 911 system in this manner will create caller fatigue. Sending out notifications at odd hours to meet the notification timeline will cause constituents signed up for the system to possibly ignore a call in the middle of the night when an actual emergency could be occurring. We recommend a once-a-year notification that alerts constituents to the presence of CSOs, with direction on how to access the public notification website and how to sign up for e-mail alerts.
- [Y]ou are burdening an already underfunded and overburdened public health workforce that cannot absorb this requirement.
- Boards of health and health departments should be provided suggested language to standardize messaging to the public.

MassDEP Response

Section 1(f) of Chapter 322 of the Acts of 2020, An Act Promoting Awareness of Sewage Pollution In Public Waters (Act), requires MassDEP, in consultation with the Department of Public Health, to establish standards for municipal boards of health or their health departments to issue public health warnings when notified by a permittee of a discharge from the permittee's outfall. This section of the Act also requires municipal boards of health or their health departments to utilize the municipality's existing emergency notification system, including, if available, reverse 911 emergency calls. To determine whether reverse 911 emergency calls are available will require a case-by-case, fact-dependent determination, with the municipality bearing the burden of establishing availability.

In response to public comments, and after further consultation with the Department of Public Health, MassDEP has determined that public health warnings are necessary for the following sewage discharge and overflow events:

- For CSO, partially treated, and blended wastewater discharges, if the discharge has a duration longer than two hours;
- For CSO, partially treated, and blended wastewater discharges, if the board of health or health department determines that a public health warning is necessary to protect public health, regardless of the duration of the discharge; or
- For any SSO that requires notification under 314 CMR 16.03(1)(c) through (e).

MassDEP heard from a variety of commenters that municipal and state resource management systems are in place to evaluate conditions at public beaches and shellfish beds when CSO discharges occur. For this reason, the final regulation requires that the public health warning includes information on where to find the closure or advisory status of shellfish growing areas, beaches, and other water resource areas potentially affected by the discharge or overflow. 314 CMR 16.09(4) identifies the information that must be included in public health warnings issued by boards of health or health departments.

Temporary Signage

MassDEP received comments on the temporary signage required when public health warnings are triggered. Comments ranged from comments on the difficulty of placing temporary signage, to who should be responsible for posting temporary or permanent signage and determining when, to when and why signage should be or should not be utilized.

- The requirement for local health officials to post signage at points of access when a discharge occurs is labor intensive, requiring a staff person to post, and then later remove the warning sign. This causes the municipality to incur costs for deploying resources to post and then remove signs, including weekends. The labor costs (including overtime) are not covered by any offsetting funding and are therefore an unfunded mandate.
- Instead of downstream communities being forced to take this on, the owners of the CSOs should be required to populate a website with CSO notifications, and to pay for and maintain the required signage.
- Temporary signs are required at access point regardless of the time of year; there is little need for such postings during cold weather months.

- Local Boards of Health should be allowed to use discretion in deploying temporary signage and other measures.
- A Local Board of Health does not have the authority to access private areas such as marinas, boat houses, and private beaches to complete this type of posting, nor does it have any authority over state facilities such as the Salisbury Beach Reservation.
- The prescribed language for the signs requires that the community post contact information for the local Board of Health or Health Department; local public health is not responsible for the discharge, and should not be the agency responsible for taking calls and questions about the posting. Instead, the posting should reflect back to the party responsible for the discharge, and questions and comments should be handled by those persons.
- The regulations do not indicate how long the temporary signs must remain posted. MassDEP should clarify if these signs must remain posted for 48 hours following a discharge or until water quality testing shows that water is safe for swimming/boating.

MassDEP Response

DEP is concerned about the impact of temporary sign posting on Boards of Health and Health Departments and believes that a broad range of measures can be utilized to minimize the impact on BOHs/Departments. The regulations have been revised to allow the use of permanent signs placed by the Board of Health/Department, permittee, or other person, provided that they can be modified to display timely information. Measures that may be utilized to provide timely updates may include, but are not limited to, lights that can be activated when public health warnings are issued, text message boards that can be programmed and activated remotely, or an area where a temporary message can be fastened to the permanent sign. DEP will accept any of these methods or other methods utilized by BOHs which are reliable and effective for alerting the public when a public health warning is issued. Further, because the regulations require translations to reach EJ communities, it will be difficult to have sufficient room to post temporary signs in multiple languages. MassDEP has modified the regulation to require that temporary or permanent signs contain notification which says, "WARNING! AVOID CONTACT WITH WATER – MAY CAUSE ILLNESS", and displays universal symbols (infographics). In addition, in neighborhoods identified as environmental justice populations due to lacking English language proficiency, the sign shall include translation of the text above and provide access to translations of additional specific information in the language(s) most appropriate for those neighborhoods. MassDEP and DPH are concerned that electronic media connected to the internet excludes people who lack internet access or smart phones (aka, the digital divide). Nonetheless, DEP believes that utilization of supplemental information such as QR codes will help to reach a wide audience who do have smart phones and who can scan the QR code to receive up-to-date information in multiple languages.

Enforcement, Violations, and Right of Entry

MassDEP received comments suggesting that sanctions and penalties should be included in the regulations, as well as comments regarding what entities should be subject to enforcement.

- The Department must assert at least a minimum penalty for each category of violation to set appropriate expectations among both operators and the public for the consequences of noncompliance.

- Minimum penalties for avoiding these regulations should be assessed.
- The onus of notification should be placed on the entity responsible for the violation, not on the community. Citing the downstream communities for failure to notify residents punishes the wrong party.

MassDEP Response

Regulations at 310 CMR 5.00 govern the enforcement responsibilities of the Department under the Civil Administrative Penalties Act, M.G.L. c. 21A, §§ 2(28) and 16; by M.G.L. c. 30A, §§ 2 and 3; and by St. 1985, c. 95, §§ 2 and 3. In addition, the Department has a mechanism in place for classifying each provision of regulations, and assigning penalty amounts to the violations. Personnel have been assigned to this task, and work will commence on classifying violations and assigning penalty amounts to them after promulgation of the regulations.

Section 42 of the Massachusetts Clean Water Act establishes a range of penalties the Department may assess for each day a violation occurs. The Department does not include statutory penalties language in regulations but cross-references the relevant statutes instead.

Section 1(f) of the Act authorizes the Commissioner of the Department to direct a municipal health official of a board or department to issue a public warning about a discharge in order to protect public health. This authority, and the corresponding responsibility for protecting public health, are reflected in the enforcement provisions at 314 CMR 16.10(1)(a) and (b), and 314 CMR 16.10(2)(j).

MassDEP prefers a cooperative relationship with sewer authorities and municipal officials, including Boards of Health. There are a variety of compliance mechanisms that MassDEP uses routinely, including enforcement discretion, education, and providing technical assistance. However, it is also agency practice to identify potential noncompliance and make provisions for taking enforcement action when other compliance mechanisms are not appropriate or are not successful.

Requirements for MassDEP

Commenters requested that MassDEP include requirements in the regulations to implement the statutory requirements applicable to MassDEP, including the requirement for MassDEP to maintain a website.

- MassDEP should include the legal requirements for itself in the draft regulations.
- Virtually every wastewater facility and collection system in the Commonwealth may have events requiring notification, there should be a central repository for the information.
- There should be a central MassDEP-managed website that those systems could report to.

MassDEP Response

This suggestion is not consistent with Department practice in development of regulations. While regulations may contain provisions describing the Department's responsibilities in administration of regulations, they do not include requirements on the Department or sanctions for failure to meet such requirements. The omission of such information in MassDEP regulations does not relieve MassDEP of complying with the provisions of the statute.

Subsection (i) of the Act specifies "The department shall provide information about discharge notifications sent by permittees to the department under subsection (c) on its website. The website shall: (i) display information about current outfall discharges in the commonwealth, which shall be

posted within 24 hours of the department receiving such data; and (ii) provide access to public advisories and timely updates regarding discharges.” In accordance with these requirements in the Act, MassDEP is developing an electronic data system that permittees will use to provide notifications to MassDEP. The data system will be designed to automatically publish notifications on MassDEP’s website. In this way, MassDEP’s website will serve as a central repository for all notifications issued by permittees. However, the existence of MassDEP’s website cannot relieve permittees of their obligation under subsection(e) to establish a public website for posting advisories and receiving requests to subscribe to notifications. Therefore, 314 CMR 16.04(3) also requires permittees to maintain a public website to be consistent with the Act.

MassDEP will continue to inform stakeholders as progress is made on the development of the data system and as further progress is made on making the data portal functional. MassDEP will provide instructions and training for permittees who are required to report through the data portal.

Many commenters advocated for relieving permittees of the obligation to maintain a website.

- Non CSO permittees shouldn’t have the financial burden of maintaining a website for SSO notifications - can MassDEP have a website for this?

MassDEP Response

The law requires that a “permittee of an outfall shall establish a public website to post advisories when issued and to receive requests from the public to subscribe to permittee’s discharge notifications.” The law does not differentiate between permittees of SSOs or CSOs in regard to this requirement. Therefore, the regulation does not relieve non-CSO permittees from the responsibility of establishing a website.

Other Topics

MassDEP received comments calling attention to circumstances that warrant clarification regarding how the requirements of 314 CMR 16.00 apply to entities which own and operate collection systems, but do not own or operate treatment works, and regional entities that operate treatment works, but do not, themselves, own or have responsibility for CSOs.

- The definition of permittee should clarify that it applies to all sanitary sewer systems in the Commonwealth.
- The proposed regulations do not address situations where the wastewater treatment plant is not responsible for and does not have a combined sewer system.

MassDEP Response

MassDEP has revised the definition of “Permittee” to encompass a person that operates a sewer system, so that is clear that these entities are responsible for notifications for events identified in 314 CMR 16.03(1)(c)-(e). In response to the second comment, MassDEP notes that responsibility for a subject discharge or overflow would depend on the event. For example, the owner of the collection system that includes a CSO would be responsible for events identified in 314 CMR 16.03(1)(a) and (c)-(e), while a

treatment works operator would bear responsibility for events identified in 314 CMR 16.03(1)(b), as well as events identified in 314 CMR 16.03(c)-(e) if they also own or operate a collection system. The treatment works would be responsible for submitting a plan specific to discharges of untreated or partially treated wastewater from their primary outfall, or could collaborate with the owner of the collection system which discharges to the treatment works, and which also owns the CSO.