Rising Waters: Recent Happenings in Washington, D.C.

Southwest Stormwater Associations' (SESWA) 19<sup>th</sup> Annual Regional Stormwater Conference









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#### 2024 Mottos

EPA: Must. Finalize. Everything.

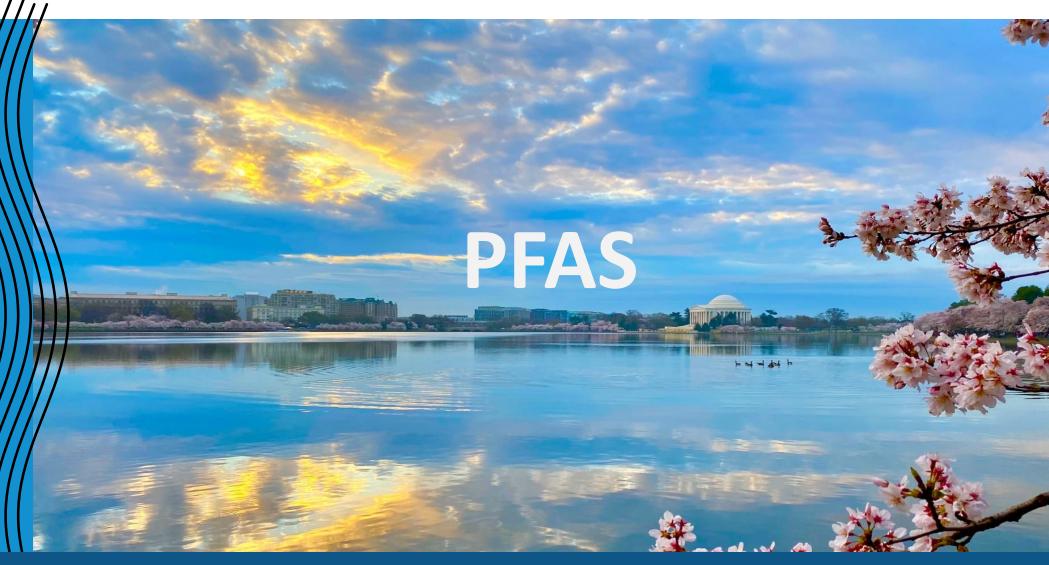
Congress: Y'all Know It's An Election

Year, Right?

PFAS: You Weren't Busy, Were You...

- EPA's PFAS agenda alone is enough to make the energizer bunny's head spin, with the Agency taking actions under CERCLA, SDWA, RCRA, the CAA and the CWA that could have major long-term impacts on utilities. CSO permitting, UAA guidance, NPDES climate provisions, WOTUS and *Maui* implementation, and cybersecurity round out an impressive albeit exhausting administrative lineup.
- While the water sector is making headway on key policy priorities in both the House and Senate, SRF funding levels leave much to be desired.
- Having decided WOTUS (probably not for the last time) and sidestepped municipal impact fees, the Supreme Court is gearing up to make waves on two major admin law questions.





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# CERCLA Be wary of any statute with a comma in its title.

- Sept. 2022 EPA proposed for first time ever to use authority to designate two PFAS – PFOA and PFOS – as "hazardous substances" under Section 102(a) of the Comprehensive Environmental Response, Compensation, and Liability Act
- April 2023 Agency took comment on whether to also designate: (1) any of the following 7 PFAS – PFBS, PFHxS, PFNA, HFPO-DA (GenX), PFBA, PFHxA, or PFDA; (2) precursors to PFOA, PFOS, or any of the 7 proposed PFAS; and/or (3) categories of PFAS
- July 2024 EPA finalized PFOA and PFOS
   designations while publishing corresponding
   enforcement discretion memo aimed at shielding
   POTWs, MS4s, community water systems, farmers
   land-applying biosolids, publicly owned/operated
   municipal solid waste landfills, publicly owned
   airports, and local fire departments from PFAS
   remediation costs

## CERCLA Enforcement Discretion Guidance



#### The Good

- Expresses EPA's position that "equitable factors do not support seeking response actions or costs under CERCLA" from wastewater, drinking water, or stormwater agencies or farms where biosolids land applied
- States EPA's intention to have major PRP settlements include ban on contribution claims and to settle out utility PRPs

#### The Bad

- Guidance is not binding (on agencies or courts)
- o Can be changed at any time
- Carves out where utility action/inaction may have "significantly contributed to or exacerbated the spread of significant quantities of PFAS"

#### The Ugly

- Third parties can still bring utilities into litigation
- o Utilities have to admit liability to get settlement protections
- Litigation and discovery can still be very costly
- Private cleanups/Section 107 cost recovery claims



We hate to say it, but we need Congress to pass bipartisan legislation



#### • S. 1430 - Water Systems PFAS Liability Protection Act

- Shields stormwater, wastewater, and drinking water agencies from CERCLA PFAS liability
- o Introduced by Sen. Cynthia Lummis (R-WY)
- Senate Environment and Public Works Committee Hearing Examining PFAS as Hazardous Substances – March 20, 2024
  - Witness: Mike Witt, General Counsel at Passaic Valley Sewerage Commission

#### H.R. 7944

- Introduced Apr. 16, 2024 by Reps. John Curtis (R-UT) and Marie Gluesenkamp Perez (D-WA)
- $\circ$  Companion to S. 1430
- Currently has ten bipartisan cosponsors

#### Next Steps

- o Bipartisan talks underway on potential compromise legislation
- Continues to be the top priority for the Water Coalition Against PFAS AMWA, AWWA, WEF, NACWA, NAWC, and NRWA



## Resource Conservation and Recovery Act



#### **April 8, 2024 - Hazardous Constituents Listing Proposal**

- Proposal to list 9 PFAS as RCRA "hazardous constituents" chemicals that have toxic, carcinogenic, mutagenic, or teratogenic effects on humans or other life forms
- Chemicals of concern that should be considered for listing as hazardous wastes
- Allows them to be assessed and addressed as part of RCRA "corrective action" process at permitted and non-permitted hazardous waste treatment, storage and disposal facilities (TSDFs)

#### Potential Impacts on Utilities

- No direct impacts to non-TSDFs, expressly acknowledges critical "domestic sewage exclusion"
- o Longer term:
  - If EPA designates PFAS as hazardous wastes, biosolids will have to be evaluated for hazard characteristics (ignitability, corrosivity, reactivity, toxicity) through toxicity characteristic leaching procedure (TCLP)
  - If EPA instead decides to list certain PFAS, would only impact those specific listed wastes/industries
  - Biosolids management via hazardous waste landfills? Not likely. Class C hazardous waste landfills do not accept organic material.



### Safe Drinking Water Act

- April 10, 2024 National Primary Drinking Water Regulation for six PFAS finalized
  - Establishes Maximum Contaminant Levels (MCLs) for individual PFAS as well as Hazard Index MCL for mixtures
  - Public water systems have:
    - 3 years to complete initial monitoring (reporting beginning in 2027)
    - 5 years (by 2029) to come into compliance with MCLs
  - Divergent Cost Estimates:
    - EPA: \$1.5 billion annually
    - AWWA Cost Estimate: \$2.5 3.2 billion annually

Compound	Final MCLG	Final MCL (enforceable levels)
PFOA	Zero	4.0 parts per trillion (ppt) (also expressed as ng/L)
PFOS	Zero	4.0 ppt
PFHxS	10 ppt	10 ppt
PFNA	10 ppt	10 ppt
HFPO-DA (commonly known as GenX Chemicals)	10 ppt	10 ppt
	1 (unitless)	1 (unitless)
Mixtures containing two or more of PFHxS, PFNA, HFPO-DA, and PFBS	Hazard Index	Hazard Index



## Analytical Methodologies and Disposal Methods

Interim Guidance on the
Destruction and Disposal of
Perfluoroalkyl and Polyfluoroalkyl
Substances and Materials
Containing Perfluoroalkyl and
Polyfluoroalkyl Substances—
Version 2 (2024)

INTERIM GUIDANCE FOR PUBLIC COMMENT
APRIL 8, 2024

#### Analytical Methods for Measuring PFAS

- Method 1633: Measures 40 different PFAS in influent, effluent, and biosolids
  - "Final" i.e., completed multi-laboratory validation stage
  - Must be promulgated as approved method under 40 CFR Part 136 before being used in CWA compliance/enforcement
- Method 1621 (Adsorbable Organic Fluorine): Measures total organic fluorine which reveals amount of all fluorine present including non-PFAS

#### Updated Interim Disposal/Destruction Guidance

- o Required by FY2020 NDAA; Second iteration
- Identifies 3 ways to manage PFAS-laden materials: thermal destruction, landfilling, and underground injection
  - Class I non-hazardous UI seen as likely most protective against environmental releases (deep well injection), followed by RCRA Sub C landfills (which don't accept organic materials that decompose like biosolids)
  - Suggests SSIs operated at too low a temp, not long enough resident time, and could result in PFAS air emissions, but not enough data to know
- o Comments due October 15, 2024



#### **Biosolids**



#### Risk Assessment Framework

- o 3-step process to assess risk of chemicals (not just PFAS) in biosolids
  - 1 prioritize risk assessment of chemical pollutants in biosolids (not limited to PFAS); 2 – screening level risk assessment; 3 – more refined risk assessment for chemicals that pose greatest risks
- Science Advisory Board critical of certain overly conservative approaches
   i.e., the "Farm Family"
- EPA separately developing risk assessments for PFOA and PFOS (proposed late summer/early fall 2024, finalized December 2024)
  - If risk found, will develop limits and compliance requirements via Part 503 regs – likely years away

#### Biosolids Working Group

- NACWA initiated need for conversation with EPA in 2020
- EPA OST agreed, and is facilitating 3-part conversation between public clean water agencies, solid waste management professionals, and state regulatory authorities on challenges and opportunities for land application, incineration, and landfilling
- o EPA to publish summary of all meetings in late 2024



## Clean Water Act Water Quality Criteria



#### Recommended Aquatic Life Criteria for PFOA and PFOS

- Proposed summer 2022; likely finalized soon but with lower numbers than originally proposed
- Originally set reasonable acute and chronic freshwater criteria but EPA now reconsidering

Criteria Component	Acute Water Comlumn	Chronic Water Column	Invertebrate Whole-Body	Fish Whole Body	Fish Muscle
PFOA Magnitude	49mg/L	0.094 mg/L	1.11 mg/kg ww	6.10 mg/kg ww	0.125 mg/kg ww
PFOS Magnitude	3.0 mg/L	0.0084 mg/L	0.937 mg/kg ww	6.75 mg/kg ww	2.91 mg/kg ww
Duration	1-hour average	4-day average	Instantaneous		
Frequency	Not to be exceeded more than once in three years, on average		Not to be exceeded more than once in tean years, on average		

#### Recommended Human Health Water Quality Criteria - PFOA and PFOS

- Likely proposed start of 2025
- Values dependent on reference doses and cancer slope factors established in National Primary Drinking Water Regulations/MCLs
- o Expected to be very low criterion values



## Clean Water Act NPDES Permitting



#### Draft POTW PFAS "Influent" Study

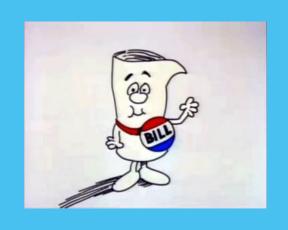
- Proposal to, as part of ELG Plan 15 and pursuant to CWA Section 308, survey 400 large POTWs and select 200-300 to:
  - Conduct PFAS sampling from upstream industries, domestic sources, influent, and effluent (2025); and
  - Biosolids sampling (2026)
- NACWA submitted comments in May proposing several changes to the study's design

#### PFAS in NPDES Applications and Permits

- February 2025 EPA intends to propose modifications to existing NPDES permit applications to address monitoring and reporting of PFAS
- Based on EPA's December 2022 memo Addressing PFAS
   Discharges in NPDES Permits and Through the Pretreatment
   Program and Monitoring Program, states and EPA Region 1 (MA
   and NH) are already beginning to include monitoring
   requirements in NPDES permits



### Federal Legislation



- Clean Water Standards for PFAS Act (introduced)
  - Re-introduced April 18, 2024 in the House by Rep. Pappas (D-NH), Rep. Fitzpatrick (R-PA) and Rep. Kildee (D-MI), and in the Senate by Sen. Gillibrand (D-NY)
  - Instructs EPA to develop PFAS human health water quality criteria, ELGs, and pretreatment standards for priority industries – essentially would hold EPA accountable for steps in its PFAS Action Plan and ELG Plans
  - Provides additional \$1 billion for Utility Implementation and Pretreatment Programs
- \$10 billion in Bipartisan Infrastructure Law (BIL) grants for PFAS and emerging contaminants (enacted)
  - \$1 billion in grants through the CWSRF
  - \$4 billion in grants through the DWSRF
  - \$5 billion for Small & Disadvantaged Drinking Water System Grants







#### 2024 Funding: Level at Best and Not Keeping Pace



Account	FY 2024	FY 2023
Clean Water SRF	\$1.638 billion	\$1.638 billion
Drinking Water SRF	\$1.126 billion	\$1.126 billion
EPA Integrated Planning	\$2 million	\$2 million
Technical Assistance for Wastewater Treatment Works	\$6.5 million	\$7.5 million
Sewer Overflow and Stormwater Reuse Grants	\$25.5 million	\$27 million
Water Infrastructure Workforce Investment	\$5.4 million	\$6 million
Stormwater Infrastructure Technology	\$2 million	\$3 million
Nonpoint Source (Sec. 319) Categorical Grant	\$15 million	\$16.326 million
Water Infrastructure Finance and Innovation Program (WIFIA)	\$72.274 million	\$75.640 million
EPA Geographic Programs	\$681.726 million	\$681.726 million





President's budget cuts CWSRF by 24% from FY 2024 enacted levels

- Sets new SRF baseline formula from the SRF Capitalization Grants to the SRF allotments, reflecting capitalization grants minus earmarks
- Calls for \$1.24 billion in baseline SRF, down from \$1.639 in FY 2024
- In addition to budget cuts, earmarks are taking a bigger % of appropriated dollars
  - FY25 proposals include a total of \$916.5 million in eamarks, which would be 56% of the Senate proposed SRF Capitalization Grants
- Save the SRFs Coalition: pledge to support full funding of SRFs at \$3.25 billion each for 2025



### **FY 2025 Appropriations Bills**



Account	President Request	House Bill	Senate Bill
Clean Water SRF	\$1.24 billion	\$1.203 billion	\$1.639 billion
WIFIA	\$80 million	\$72 million	\$72 million
Sewar Overflow and Stormwater Reuse Grants	\$50 million	\$41 million	\$41 million
Clean Water Infrastructure Resiliency and Sustainability	\$25 million	\$0	\$0
Stormwater Infrastructure Technology	\$5 million	\$2 million	\$3 million
Water Infrastructure Workforce Investment	\$6 million	\$5 million	\$5.4 million
Technical Assistance for Wastewater Treatment Works	\$18 million	\$25.5 million	\$27.5 million



### BABA – humbug

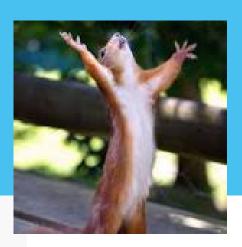


#### • Build America, Buy America Mandates

- Expanded domestic procurement requirements to cover construction materials and manufactured goods (not just iron and steel); and
- Applies to any project receiving any federal infrastructure investment funding (water, roads, bridges etc.) – including SRF and WIFIA - after May 14, 2022
- EPA waived BABA for SRF projects that had initiated design planning before May 2022, but only for projects funded in FY 2022 and 2023
  - However, EPA has clarified that waivers could potentially extend into future for projects that began by end of FY 2023
- Utilities can potentially still get a waiver if BABA compliance drives costs of projects up 25% or more or if compliance is not in the public interest



## Clean Water Act Reforms (Really!!!)



#### H.R. 7023 – Creating Confidence in Clean Water Permitting Act

- Passed House by vote of 213-205
- Comprised of five standalone bills approved by House T&I Committee, including:
  - H.R. 7013 Confidence in Clean Water Permits
     Act: codifies EPA's longstanding "permit shield"
     policy and clarifies that "cause or contribute"
     and other vague provisions not allowed in
     NPDES permits
  - H.R. 7021 Water Quality Criteria
     Development and Transparency Act subjects
     EPA-developed 304(a) water quality criteria to
     APA notice and comment process and limited
     judicial review under CWA Sec. 509(b)



#### **Flushable Wipes**

- Wastewater Infrastructure Pollution Prevention and Environmental Safety (WIPPES) Act – H.R. 2964 and S. 1350
  - Sets federal "Do Not Flush" labeling standards for non-flushable wipes and provides a consistent national labeling landscape. Closely modeled after state laws and would preempt state wipes labeling laws
  - Requires consultation between Federal Trade Commission, EPA, Food and Drug Administration, and Consumer Product
     Safety Commission
  - Re-introduced on a bipartisan, bicameral basis: Sens. Jeff Merkley (D-OR) & Susan Collins (R-ME); Reps. Mary Peltola (D-AK) & Lisa McClain (R-MI)
    - House Committee on Energy and Commerce approved by unanimous vote Dec. 2023, held legislative hearing Sept.
       2024 ("Proposals to Enhance Product Safety and Transparency for Americans")
    - Senate referred to Committee on Commerce, Science, and Transportation
  - o Supported by NACWA, WEF, CASA, and the Association of the Nonwoven Fabrics Industry (INDA)





#### **Low-Income Water Assistance**

- Low-Income Household Water Assistance Program (LIHWAP)
  - o Department of Health and Human Services (HHS) program created during the pandemic
  - o First ever federal funding specifically to assist low-income water and wastewater ratepayers
  - \$1.138 billion (\$638 million from Dec. 2020 Consolidated Appropriations Act and \$500 million from March 2021 American Rescue Plan Act) – authorized through Sept. 30, 2023
  - o Assisted over 1.6 million households as of April 2024
  - 2024 LIHWAP Water Utility Affordability Survey Report: found that on average, 20% of households are in debt to their water utility (32% for tribal communities).
- Legislation for Permanent Low-Income Program Introduced in House and Senate
  - o H.R. 8032 Low-Income Household Water Assistance Program Establishment Act
    - Introduced in the House on a bipartisan basis March 2024 by Reps. Sorenson (D-IL) and Chavez-DeRemer (R-OR)
    - Companion to S. 3830, introduced by Sen. Padilla (D-CA)
    - Incorporates low-income water assistance into the federal social safety net by authorizing and making permanent HHS'
       LIHWAP program





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#### **U.S. Supreme Court – Makin' Waves**



#### Sheetz v. County of El Dorado - Municipal Impact Fees

- <u>At issue</u>: suit from property rights activists claiming municipal traffic mitigation fee 5<sup>th</sup> Amendment "takings"
- <u>Unanimous Apr. 2024 decision</u>: such fees aren't exempt from "takings" analysis merely because they legislatively enacted
- <u>Left unanswered</u>: whether such fees, including those charged by wastewater, stormwater, and drinking water utilities, not "takings" for other reasons
- Result: expect to see more fee challenges in state courts

#### San Francisco v. EPA - "Cause or Contribute"

• <u>Cert Petition</u>: Are generic requirements in NPDES permits requiring permittees not to "cause or contribute to the violation of WQS" lawful under the CWA?

#### Loper Bright Enterprise v. Raimondo and Relentless v. Department of Commerce – Chevron Deference

- Oral Arguments: Should *Chevron* deference be replaced and, if so, with what?
  - Skidmore?

#### <u>Corner Post v. Federal Reserve – Timing of APA Challenges</u>

- Oral Arguments: When does the 6-year statute of limitations to bring a facial challenge to a rule under the APA begin to run?
  - When the rule becomes final?
  - When the rule injures an individual?



### Maui and WOTUS



#### County of Maui v. EPA

- Nov. 2023 Proposed draft guidance, Applying the Supreme Court's County of Maui v. Hawaii Wildlife Fund Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program to Discharges through Groundwater
  - Provides info on applying "functional equivalent" analysis to point sources reaching WOTUS via groundwater
  - Omits mention of green infrastructure, aquifer recharge, and water reuse and recycling
- May 2024 EPA issued final guidance

#### Waters of the United States (WOTUS)

- Aug. 2023 EPA issues new final WOTUS definition (again)
- Incorporates Supreme Court May 2023 Sackett decision limiting federal jurisdiction to "relatively permanent bodies of water" and wetlands with a "continuous surface connection" to such waters
- Litigation has unsurprisingly ensued



### **EPA Clean Water Needs Assessment**



- Compiles data on clean water needs over next 20 years
- Shows a nationwide picture of clean water infrastructure across wastewater, stormwater, decentralized wastewater treatment, and nonpoint source
- Survey is voluntary and likely is underrepresented of the true need
- Nationwide needs are \$630.1 billion
  - o \$345.7 billion for wastewater (55%)
  - o \$115.3 billion for stormwater (18%)
  - o \$94.4 billion of nonpoint (15%)
  - $\circ$  \$74.7 billion for decentralized (12%)

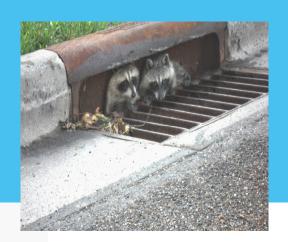




- NACWA, American Rivers, NMSA, and WEF sent a letter to EPA Administrator Reagan calling on:
  - Increased funding, financing, and flexibility for stormwater management
  - o Reduced barriers for stormwater agencies to access SRF funding
  - Stronger communication and coordination plans to enhance state, municipal and regional stormwater management
  - Guidance to enhance public-private partnerships for stormwater management
  - Better incorporation of integrated planning for stormwater, wastewater, and drinking water management
- Office of Water respond in August
  - Provided examples of policies that better incorporate green infrastructure and stormwater management practices
  - Highlighted CWSRF flexibilities including customizing interest rates, limited loan forgiveness, and tailoring repayment terms
  - New EPA grant money to establish Centers of Excellence for Stormwater control



### FY24 Sewer Overflow Grants



- EPA Announced \$41 million in funding through the Sewer Overflow and Stormwater Reuse Municipal Grant program
  - Funding is available to states to support projects strengthening communities' stormwater collection systems to be more resilient against increasingly intense rain events made worse by the climate crisis
  - Funds can be used for the planning, designing, and construction of combined sewer overflows (CSOs), sanitary sewer overflows (SSOs), and stormwater management projects

## Stormwater Centers of Excellence



#### EPA Announced \$5 million to Establish Stormwater Centers of Excellence

- The four new Stormwater Centers of Excellence include the University of New Hampshire, the University of Oklahoma, the Board of Regents Nevada System of Higher Education, and the Center for Watershed Protection, Inc.
- EPA has also selected the Center for Watershed Protection, Inc., to establish a national electronic clearinghouse on information about new and emerging stormwater control technologies and funding approaches.

#### **Cybersecurity**

#### State Consultation

- Mar. 2024 EPA Administrator Regan and National Security Advisor Jake Sullivan invited state environmental, health, and security secretaries to participate in discussion on water sector cybersecurity
- Focus on sector practices most vulnerable to attack, cyber challenges faced by sector, and potential near- and long-term strategies to mitigate cyber threats

#### EPA-Facilitated Dialogue

- Discussions between NACWA, WEF, and EPA on how to collaborate to improve cybersecurity for wastewater utilities
- Follows discussions between National Security Council, EPA, and water sector associations
- EPA plans to coordinate with the Water Sector Coordinating Council to establish a task force to work with facilitator to determine potential strategies



#### Who needs a mimosa??

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#### **Post-LTCP CSO Permitting**

#### **EPA Draft Guidance for Future NPDES Permitting of Combined Sewer Systems**

- Guidance from EPA HQ to permit writers
- Focuses on Integrated Planning as path forward for combined sewer system communities discharging into waterbodies not attaining WQS even after successful completion of LTCP
- Requirements related to climate change mitigation, including updating "typical year" calculations
- Requirements related to integrating environmental justice considerations into post-LTCP permitting

#### CSO Temporal Recreational Uses or WQS Variances based on 40 CFR 131.10(g)(3)

- Memorandum from OST to EPA Regions
- Instructs Regions re: when can approve CSO-related temporal recreational use or variance based on 40 CFR 131.10(g)(3) (Factor 3 – human caused sources of pollution prevent attainment and cannot be remedied or would cause more environmental damage to correct than leave)
- · Onerous requirements:
  - Showing that alternatives provide greater environmental benefits than CSO controls, not already required or financially committed to, and couldn't be implemented if CSO controls required
  - Must make enforceable via permits even if non-point source related
  - Must revisit every 3 years and revoke where "non-CSO sources of bacteria have been controlled to a level such that CSO controls would provide greater benefit"



#### Climate Change Considerations in NPDES Permits



#### EPA Region 1 Permits for POTWs

- Include onerous provisions concerning "major flood and storm event" planning for treatment plants and sewer systems
- Requires utilities and co-permittees to identify vulnerable critical assets and operations in both near (10-25 years) and far (25-70 years) terms and develop a plan of adaptive measures to minimize risks (including funding sources)

#### Purported Authority

- 40 CFR 122.41(d) and (e) regulations concerning proper operations & maintenance and a duty to mitigate adverse impacts to human health or the environment
- o Point source discharges? Apparently not required anymore...

#### Legal Challenge

- o Filed by Holyoke, one of first permits finalized
- o Referred to arbitration by EPA's Environmental Appeals Board

