BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: CHARLES RIVER POLLUTION CONTROL DISTRICT NPDES Permit No. MA 0102598	)	NPDES APPEAL NO. 14-

PETITION FOR REVIEW BY UPPER BLACKSTONE WATER POLLUTION ABATEMENT DISTRICT AND THE TOWNS OF BELLINGHAM, FRANKLIN, MILLIS AND MEDWAY

/s/

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INTRODUCTION

Pursuant to 40 C.F.R. §124.19(a), the Upper Blackstone Water Pollution Abatement District and the Towns of Bellingham, Franklin, Millis and Medway, Massachusetts ("Petitioners") petition for review of the conditions of National Pollutant Discharge Elimination System ("NPDES") Permit No. MA 0102598 (the "Permit") that was issued to the Charles River Pollution Control District (the "District" or "CRPCD") on July 23, 2014 by the United States Environmental Protection Agency Region 1 ("Region 1" or the "Region").[1] The District's facility collects and treats wastewater from the Towns of Franklin, Medway, Millis and Bellingham, Massachusetts (the "Towns"). Petitioners contend that certain conditions are based on clearly erroneous findings of fact and conclusions of law or present an exercise of discretion or an important policy consideration that the Environmental Appeals Board ("Board" or "EAB") should, in its discretion, review. Specifically, Petitioners challenge the following permit conditions:

1. The inclusion of the Towns as co-permittees for specific activities required at Sections I.B – Unauthorized Discharges - and I.C – Operation and Maintenance of the Sewer System, which include conditions regarding operation and maintenance of the collection systems (at page 1 of 15 of the Permit).

2. The applicability of Part I.B. – Unauthorized Discharges - to co-permittees (at page 7 of 15 of the Permit).

3. The applicability of Part I.C. – Operation and Maintenance of the Sewer System – to "each co-permittee…for the collection system which it owns" (at pages 7-9 of 15 of the Permit).

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[1] The Permit was signed on July 23, 2014, and mailed via certified mail on July 25, 2014, received by Petitioners on July 28, 2014. This Petition is timely filed within 30 days in accordance with 40 C.F.R. § 124.19(a)(3) and § 124.20(d).

THRESHOLD PROCEDURAL REQUIREMENTS

Petitioners satisfy the threshold requirements for filing a Petition for review under 40 C.F.R. part 124:

1. Petitioners have standing to petition for review of the Permit decision because they participated in the public comment period on the permit. *See* 40 C.F.R. §124.19(a). The Petitioners' comment letters are in the administrative record and reproduced in the Region's Response to Comments ("RTC" or "Response"), attached as Exhibit A.

2. The issues raised by the Petitioners in this petition were raised during the public comment period and therefore were preserved for review, as set forth by citation to the record in this petition as "Comment #__" as referenced in the RTC.

FACTUAL AND STATUTORY BACKGROUND

Each of the Towns owns and operates a sewer collection system that transports sewer flow to a wastewater treatment plant for treatment and discharge to U.S. waters. The treatment plant is owned and operated by the District. The District was established under the provisions of M.G.L. c. 21, § 28.

The District's facility discharges treated wastewater to the Charles River in Medway, Massachusetts under NPDES Permit No. MA 0102598. Over 238 miles of sewer lines contribute to the District's facility. Approximately 13 miles of interceptor lines are owned and operated by the District. Town owned satellite sewer collection systems consist of: approximately 125 miles owned by Franklin, 53 miles owned by Medway, 27 miles owned by Millis, and 22 miles owned by Bellingham.

On June 2, 2004, the District submitted to the Region NPDES Forms 2A and 2S to fulfill renewal requirements for Permit No. MA 0102598 for the District's wastewater treatment

facility. Exh. B. None of the Towns participated in the District's application as a co-applicant or sought to be identified as a "co-permittee" in connection with the District's June 2, 2004 renewal application. None of the Towns signed or certified CRPCD's application form. See Exh. B, p. 9 of 21. None of the Towns separately made any application for or asked the Region to include them as a co-permittee to District's permit.

On July 3, 2008, the Region and the Massachusetts Department of Environmental Protection (MassDEP) released a Draft Permit for the District wastewater treatment facility for public review and comment. The public comment period closed on August 1, 2008. Numerous comments were made, including comments from the CRPCD and its member communities. See Exh. A, pp. 1-2. Among the issues raised by the comments was the legal basis for including the Towns as "co-permittees" to the NPDES Draft Permit. The Draft Permit requirements that applied to the co-permittees were Sections I.B and I.C., which concern sewer system operation and maintenance and unauthorized discharges.

After the public comment period closed in 2008, the Board issued a decision questioning the policy basis and legal authority for identifying owners and operators of satellite collection systems as co-permittees in NPDES permits. On May 28, 2010, the Board issued a decision remanding to the Region NPDES permit provisions that included and regulated satellite collection systems as co-permittees in the matter of In re Upper Blackstone Water Pollution Abatement District, NPDES Appeal Nos. 08-11 to 08-18 & 09-06, 14 E.A.D. 577 (Order Denying Review in Part and Remanding in Part, May 28, 2010). http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/NPDES%20Permit%20Appeals%20(CWA)/F22DB97558D954F2852578E00070F961/$File/Upper%20Blackstone.pdf. The Region's position before the Board in the Upper Blackstone matter was that its NPDES jurisdiction encompassed

not only the treatment plant but also separately owned and operated collection systems that discharge into the treatment plant. The Board, however, held that "where the Region has abandoned its historical practice of limiting the permit only to the legal entity owning and operating the wastewater treatment plant, the Region had not sufficiently articulated in the record of this proceeding the statutory, regulatory, and factual bases for expanding the scope of NPDES authority beyond the treatment plant owner and operator to separately owned and operated collection systems that do not discharge directly to waters of the United States, but instead that discharge to the treatment plant." Upper Blackstone, at 577-78.

The Board further stated that in the event the Region decided to include and regulate municipal satellite collection systems as co-permittees in a future permit, it should consider and address the following several questions:

> (1) In the case of a regionally integrated POTW composed of municipal satellite collection systems owned by different entities and a treatment plant owned by another, is the scope of NPDES authority limited to owners/operators of the POTW treatment plant, or does the authority extend to owners/operators of the municipal satellite collection systems that convey wastewater to the POTW treatment plant?
>
> (2) If the latter, how far up the collection system does NPDES jurisdiction reach, i.e., where does the "collection system" end and the "user" begin?
>
> (3) Do municipal satellite collection systems "discharge [ ] a pollutant" within the meaning of the statute and regulations?
>
> (4) Are municipal satellite collection systems "indirect dischargers" and thus excluded from NPDES permitting requirements?
>
> (5) Is the Region's rationale for regulating municipal satellite collection systems as co-permittees consistent with the references to "municipality" in the regulatory definition of POTW, and the definition's statement that "[t]he term also means the municipality…which has jurisdiction over the Indirect Discharges to and the discharges from such a treatment works"?
>
> (6) Is the Region's rationale consistent with the permit application and signatory requirements under NPDES regulations?

Upper Blackstone, at 591, n. 17.

Thereafter, the Region and MassDEP partially reopened the District's Draft Permit for public comment on, among other issues, the addition of co-permittees to impose conditions relating to sewer system operation and maintenance and unauthorized discharges. In that 2012 partially revised Draft Permit, the Towns remained listed as co-permittees. The fact sheet for the 2012 partially revised Draft Permit included, at Attachment 1, a document entitled "EPA REGION 1 NPDES PERMITTING APPROACH FOR PUBLICLY OWNED TREATMENT WORKS THAT INCLUDE MUNICIPAL SATELLITE SEWAGE COLLECTION SYSTEMS" ("Region's Analysis"). Exh. C. This document, according to Region 1, establishes its legal authority to include satellite communities as co-permittees.

Following issuance of the partially revised Draft Permit, each Town, the UBWPAD, and CRPCD provided comments disputing the Region's legal authority and policy reasoning for including as co-permittees the owners and operators of separate sewer collection systems that convey sewage to the CRPCD's facility for treatment and discharge. See generally, Exh. A.

On July 23, 2014 the Region issued the final permit with the contested co-permittee provisions. The Permit is available here http://www.epa.gov/region1/npdes/permits/2014/finalma0102598permit.pdf and at EPA's website, along with the Region's Response.

PARALLEL PROCEEDINGS

In addition to this petition, the Petitioners have appealed the Surface Water Discharge Permit ("SWDP") issued by MassDEP on July 23, 2014 pursuant to M.G.L. c. 21, Section 26 – 53 and 314 CMR 3.00.

TERMS AND CONDITIONS APPEALED

The EAB may review and remand permits where the Regional office of EPA has made determinations based on clearly erroneous findings of fact or conclusions of law, or present an exercise of discretion or an important policy consideration that the Board should, in its discretion, review. 40 CFR 124.19(a)(4). As set forth below, the Petitioners seek review of certain terms and provisions of the Permit. The Petitioners have identified each of those terms and provisions at page 1 above, and in Attachment A and hereby incorporates Attachment A as part of this Petition. All provisions of the Permit which are not appealed by this Petition or included in Attachment A are severable from the appealed provisions that would be effective on the effective date of the Permit.

ARGUMENT

A. The Region Lacks Legal Authority To Make The Towns' Collection Systems Subject To NPDES Permitting.

The Region has no legal authority under the Clean Water Act ("CWA") or any NPDES regulation, and has provided no sound factual basis, to include the Towns, as owners or operators of sewer lines that convey waste water to a separately owned POTW treatment plant for treatment and discharge of pollutants from a point source to a navigable water, as "co-permittees" to the Permit.

1. Region Continues to Stretch and Conflate Definitions to Support its Claim to Legal Authority for Co-Permittees.

The Towns provided comments on the Region's Analysis issued with the draft permit, noting among other the things, the absence of legal authority and the Region's failure to acknowledge or reference the operative terms of the CWA that trigger NPDES permitting. Contrary to Region's position, the operative and triggering terms are: "discharge of any pollutant by any person" from a point source; that it is the act of discharging a pollutant from a point

source that gives rise to NPDES permitting; and that ownership of a collection system, even as part of a greater POTW, does not require a NPDES permit under the CWA; and that the Towns' collection systems have no point source, as they send wastewater to a separately owned treatment plant for treatment and discharge at a point source. Comment #4, #34-35, #43.

In it Response, the Region makes the conclusory claim that the "Towns may be subjected to NPDES permitting requirements because they operate portions of the POTW that discharge to U.S. waters," and the Towns' objection relies on an "overly narrow interpretation" of "point source." (RTC# 34 and #35). The Region's Response misses the mark. The Towns are not persons who discharge from a point source; the Towns are not "dischargers," and EPA's authority to "regulate dischargers" is limited to CRPCD, as a facility that conducts an activity that is subject to regulation under the NPDES program.

The Region notes that the term "point source" includes "any discernable, confined, or discrete conveyance, including . . . any pipe" and concludes that because the Towns have collection systems (i.e., pipe), they must fall within the broad definition of "point source." (RTC #34). The Region, however, ignores the critical words that follow "any discernable, confined, or discrete conveyance . . ." - "<u>from which pollutants are discharged</u>." (Emphasis supplied). There is no "discharge" from the several Town conveyance systems. And in this case, there is but one discharge point authorized in the Permit. See Permit Part I. A. 1. ("the permittee [i.e. CRPCD] is authorized to discharge treated effluent from outfall serial number 001 to the Charles River," and at B, "the permit only authorizes discharge in accordance with . . . this permit and only from the outfall listed in Part I. A.1."). It is that point source "from which pollutants are discharged" that triggers NPDES permitting, and only those persons who own or operate that point source are subject to such permitting. That point source is not owned or operated by the Towns.

The Region now claims the "point source" is the entire POTW. (RTC #35). "[T]he point source in question here is not merely Outfall 001, it is the entire POTW". (RTC # 43). According to the Region, because the Towns' collection systems comprise a portion of the POTW and are therefore subject to NPDES permitting. (RTC #34, #35). The Region's position in its Response defies all logic – as there must be some "point" "from which" there is a discharge to navigable waters that triggers NPDES permitting – and the permitting scheme established by the CWA and comprehensive NPDES permitting regulations at 40 C.F.R. 122.

Section 301(a) of the CWA states that the discharge of any pollutant is prohibited "except as in compliance with the law:"

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title[2] the discharge of any pollutant by any person shall be unlawful.

The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." CWA § 502(12). "The term 'discharge' when used without qualification includes the discharge of a pollutant and a discharge of pollutants." CWA § 502(16). Thus, under the CWA, it is only those persons who discharge a pollutant from any point source to navigable waters who are subject to NPDES permitting. Said differently, it is the act of discharging a pollutant from a point source that gives rise to NPDES permitting.

CWA § 402(a)(1) authorizes EPA to "issue a permit for the discharge of any pollutant." The CWA authorizes the EPA to issue permits for the discharge of pollutants to "persons" who discharge and to promulgate effluent limitations for—and issue permits incorporating those effluent limitations for—the discharge of pollutants. CWA § 301(e) provides that "[e]ffluent limitations ... shall be applied to all point sources of discharge of pollutants." Unless there is a

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2 33 USC § 1312 (CWA § 302) deals with water quality related effluent limitations; § 1316 (CWA Section 306) deals with the national standards of performance for new sources; Section 1317 (CWA § 307) deals with toxic and pretreatment effluent permits; § 1328 (CWA § 318) deals with agriculture projects; § 1342 (CWA § 402) deals with NPDES permit requirements; and § 1344 (CWA § 404) deals with permit for dredged or fill material.

"discharge of any pollutant," there is no statutory obligation to seek or obtain an NPDES permit. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 504 (2d Cir. 2005). Because the Towns, under these terms, do not "discharge . . . any pollutant," they are not subject to NPDES permitting.

The Region continues to conflate the term "discharge" used in "discharge of a pollutant" with the "transfer of flow" or "conveyance" from a municipal conveyance system to the treatment plant or works that has a point source "from which pollutants are discharged." The facts are plain and have not changed: the Towns do not "discharge" pollutants to waters of the United States; wastewater flow is conveyed or otherwise transferred through municipal collection systems to the treatment plant or works for treatment; treated flow is then discharged by the District's POTW in compliance with the law and Section 301(a) of the CWA. Transfer of waste water flow from Town satellite collections systems does not constitute a "discharge" as the term is defined, and does not trigger a need for any NPDES permit because the "point source" is subject to a NPDES Permit No. MA 0102598 issued to CRPCD.

2. Region Erroneously Relies on Section 212 Definition of POTW for Federal Grants to Interpret NPDES Permitting Provisions.

The Region relies upon a definition of "publicly owned treatment works" or POTW that has no application to the provisions of the CWA requiring persons who discharge any pollutant from a point source do so lawfully. The Region states:

> Under EPA's regulations, a POTW "means a treatment works as defined by Section 212 of the Act, which is owned by a state or municipality (as defined by Section 502(4) of the act)." 40 C.F.R. § 403.3(q).

(RTC #34). Section 212 of the CWA, however, explicitly states that the definitions it contains are "as used in this subchapter." Subchapter II of the CWA deals with "grants for the construction of treatment works," and the definition of "treatment works" in that chapter was intentionally broad so that federal grants program could provide financing for collection systems

as well as for treatment plants. This broad definition does not apply to subchapter III of the CWA which addresses NPDES permitting requirements and provides that "the discharge of any pollutant by any person shall be unlawful" absent compliance with permitting provisions. Courts considering Section 212 have stated:

> The legislative history [of the Act]. . . indicates that the broad definition of treatment works in section 212 was viewed as an expansion beyond the common meaning of the word, an expansion justified by the context of federal grant authorizations. For example, the Senate Public Works Committee Report urged that "it would be unwise to exclude from the construction grant program facilities that in some instances could achieve water quality objectives on a far more economical and efficient basis than through the construction of treatment facilities. (citations omitted) . . .. Thus neither the language of the Act nor its history supports the conclusion that the definition of "treatment works" in section 212 should be viewed as supplying the meaning of that term in section 301."

Montgomery v. Costle, 646 F.2d 568, 591 (U.S.App.D.C. 1980).

The Region relies upon United States v. Borowski, 977 F.2d 27 (1st Cir. 1992) to support its use of "treatment works" as defined in Section 212 regarding federal grants to interpret NPDES permitting provisions. (RTC #34). In that case, the court considered the definition of "treatment works" to address the question, raised by the EAB in the Upper Blackstone matter, on whether the POTW extends through a private party's own pipes right up to the sink drain where defendants, in that case, dumped materials. The court wanted to know what is "publicly owned" and notes that "part of the significance of the definition of what is public relates to the allocation of costs so that federal funding for capital costs of publicly-owned systems can be recovered from industrial users." Id at 30, n. 5. Thus, contrary to the Region's assertion Borowski confirms that "treatment works" as defined by § 212 applies to grants for construction, and not for the purpose of determining persons subject to NPDES permitting.

Similarly, 40 C.F.R. § 403.3(q), upon which the Region also relies to say a POTW is a point source, deals not with permitting required of "direct discharges" under Section 301(a) of the CWA, but instead pre-treatment regulations for industrial discharges to POTWs. See 40

C.F.R. § 403.1 (limiting application of Part 403 to pollutants from non-domestic sources covered by pretreatment standards indirectly introduced to POTWs).

The Region's definition of POTW simply does not apply to NPDES permitting requirements. Moreover, the Region's position that the collection system is part of the POTW does not advance its argument that "satellite collection systems" should be deemed "co-permittees" in NPDES permits. While the Region seeks "to refashion permits issued to regionally integrated POTWs to include all owners/operators of the treatment works (i.e., the regional centralized POTW treatment plant and the municipal satellite collection systems)," permit conditions "pertain only to the portions of the POTW collection system that the satellites own." Region's Analysis, p. 7. See Permit I.1.C. Because the Towns do not own or operate the point source – Outfall 001 – they are not a person who may be subject to a NPDES permit.

3. The Towns Are Not Direct Discharges And Are Not Required To Have NPDES Permits.

The definition of "discharge of a pollutant" includes "addition of pollutants into waters of the United States from: . . . discharges through pipes, sewers or other conveyances owned by a . . . Municipality . . . which do not lead to treatment works." See 40 C.F.R. 122.2 (persons who "discharge[] through pipes, sewers, or other conveyances owned by a . . . municipality which do not lead to a treatment works" are persons who "discharge [ ] a pollutant" under 40 C.F.R. 122.2. (emphasis supplied). The Region, at footnote 12 of the Analysis, states that it is erroneous to argue the converse: that pollutants to waters of the United States via pipes to a treatment plant are not a "discharge of a pollutant." In support of that position, the Region said that there is "[o]nly one category of such discharges excluded: indirect discharges." In their comments, the Towns noted that while it is true that the definition of "discharge of a pollutant" at 40 C.F.R. 122.2 excludes pollutants from "indirect discharges," that does not mean that only "indirect

dischargers" fall outside the scope of "discharge of a pollutant" or that an interpretation of the definition of "discharge of a pollutant" which excludes waste water from separately owned collection systems is not reasonable in light of the definition of other terms, described above, that require permitting for point sources. Comment #35. The use of the term "treatment works" as it appears in the regulatory definition of "discharge of a pollutant" does not preclude this rational interpretation.

In its RTC, the Region says that the Towns' comments "imply that they should be treated as indirect discharges," and then says the indirect discharger is limited to only those persons subject to separate pretreatment standards. (RTC # 35). Nothing, however, in the CWA or permitting regulations says that "indirect dischargers" are the only persons subject to separate pretreatment standards, that others are not excluded from the permitting requirements, or that waste water from separately owned collection systems would not fall into this excluded category. Rather, consistent with the Town's position, the term "indirect discharger" at 40 C.F.R. 122.2 is defined broadly to mean "a non-domestic discharger introducing 'pollutants' to a [POTW]." The Town's systems convey sanitary sewage and non-domestic wastewater to the treatment facility/POTW prior to discharge.

The Region says the Towns rely on an "overly restrictive interpretation of POTW." (RTC #36). The Region's position, however, is not consistent with the references to "municipality" in the definition of POTW found at 40 C.F.R. § 403.3(q), and the definition's statement that "[t]he term also means the municipality . . . which has jurisdiction over the Indirect Discharges to and the discharges from such a treatment works." The final sentence of the regulatory definition of POTW in the pretreatment regulations at 40 C.F.R. § 403.3(q), refers to municipalities that have "jurisdiction over . . . the discharges from such a treatment works." The term "municipality" as

defined in CWA § 502(4) "means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes . . . ." (emphasis supplied). The Towns have jurisdiction over only their collection systems. They have no jurisdiction over the treatment plant or point source of discharge. Thus, the Region's position that a satellite collection system is part of a POTW is inconsistent with the final sentence of the regulatory definition of POTW in the pretreatment regulations.

4. Region 1 Still Has Not Explained The Scope Of Its NPDES Authority.

Before the EAB in the Upper Blackstone matter, the Region argued, in response to the question of how far up the collection systems the Region's legal reasoning would allow the Region to impose co-permittee requirements, that it "'would regulate it in the same way' as a single-entity POTW. EAB Oral Argument Transcript ("Tr.") at 70. 'We can regulate that which is legally part of the POTW that falls within the definition of POTW.'" Upper Blackstone at 587. EAB rejected this argument by the Region with its remand of the co-permittee provisions in its decision in Upper Blackstone.

Nevertheless, the Region makes the same argument here in its Analysis and RTC: "[A] satellite collection system owned by one municipality that transports municipal sewage to another portion of the POTW owned by another municipality can be classified as part of a single integrated POTW system discharging to waters of the U.S.," Analysis, pp. 10 – 11, and may be subject to NPDES permitting requirements because "they operate portions of the POTW that discharge to U.S. waters." (RTC #34 #35). It was that analysis that EAB found troubling, and which the Region still does not explain: "the extent to which collection systems not owned by the entity owning or operating the treatment works are subject to NPDES permitting." Upper Blackstone at 587.

The Region also says it relies upon the definition of "sewage collection system" at 40 C.F.R. 35.905; and that that provision sets forth the test for determining where the POTW ends in the users begin. (RTC # 46). That definition, however, applies only to federal grants for construction of treatment works. See 40 C.F.R. 35.905 (limiting definitions for use in subpart governing grants for construction of treatment works by the words "as used in this subpart").

Despite the EAB's remand in Upper Blackstone on the co-permittee issue, the Region's Analysis and its RTC does not provide or set forth authority for expanding the scope of NPDES authority beyond the treatment plant owner and operator to separately owned and operated collection systems that discharge to the treatment plant. Accordingly, the Board should remand the Permit to the Region with the order to strike the "co-permittee" provisions from the Permit.

B. The Absence Of EPA Authority To Make The Towns Co-Permittees Is Borne Out By The Permitting Process And EPA's NPDES Program Regulations

Consistent with the CWA, EPA regulations require persons "who discharge pollutants" to have a NPDES Permit. See CWA § 301(a)("except in compliance with this section and [other sections] of this title, the discharge of any pollutant by any person shall be unlawful"), and CWA § 402(a)(authorizing EPA to issue a permit "for the discharge of any pollutant"). Similarly, 40 C.F.R. § 122.21(a), entitled "Duty to Apply," provides that "[a]ny person who discharges or proposes to discharge pollutants . . . must submit a complete application . . . in accordance with this section [122.21] and part 124 of this chapter." 40 C.F.R. § 122.21(a)(i). (Emphasis supplied). Throughout, the permit application regulations at 40 C.F.R. § 122.21 contemplate that it is the "person" who discharges pollutants who must obtain a NPDES Permit. See 40 CFR § 122.21 (a)-(c) (imposing obligations on persons who must apply or "applicants"). Consistent with CWA, it is the person who discharges a pollutant from a point source who is subject to NPDES permitting requirements.

The Towns made no application for any NPDES permit. Exh. B. The Towns noted in their comments that nothing in 40 C.F.R. § 122.21 requires or suggests that "satellite collection systems" need to make application for a NPDES permit. Comment #37. Nowhere in 40 C.F.R. § 122.21 is there any reference to "co-permittee" or any suggestion that separately owned and operated conveyance systems are subject to NPDES permitting.

In the face of the clear duty upon persons who discharge to apply for a permit, the absence of any application by any Town, and no "co-permittee" provisions in its regulations, the Region now says NPDES application requirements do not:

> preclude it from framing an NPDES permit based on [the statutory authorities underlying the NPDES permitting program] to encompass owners and operators of portions of the POTW that are "up system" of the ultimate up of outfall point . . . . It is sufficient that the Act and implementing regulations make reference to discharges of pollutants from point sources to U.S. waters. . . . Accordingly, the permit application requirements are not dispositive of the question of whether the Region is legally authorized to impose NPDES permit requirements on portions of the treatment works beyond the treatment plant.

(RTC #37).

First, the Towns disagree. The statutory authorities and regulations referenced by the Region do not reflect EPA authority to impose NPDES permit requirements on the Towns. Nor has the Region justified its abandonment of the Region's historic practice of limiting the NPDES permit to the only the legal entity owning or operating the wastewater treatment plant which treats and discharges pollutants to U.S. waters.

Second, it is irrational, arbitrary and an error of fact and law for the Region to say in the same breath that owners and operators of satellite collection systems <u>are</u> persons who discharge from a point source, but are also persons who have no duty to apply for a permit under 40 C.F.R. § 122.21(a) under the NPDES regulatory scheme. But this is exactly what the Region says. "40 C.F.R. § 122.21(a) applies to the Towns because they are a point source dischargers [sic]

discharging pollutants to portions of the POTW operated by them." (RTC #37). The Region then conclusively claims "there is nothing to indicate that EPA is barred from issuing a permit that covers each of the several operators of the regionally integrated POTW, where the combined discharge flows through a single outfall." In short, Region claims that the Towns – are "dischargers" – yet even when characterized as "dischargers" the Region finds, contrary to regulation, that the Towns need not apply because nothing bars the Region from issuing a permit. The question raised by the Towns' comments, and by the EAB in the Upper Blackstone matter, is not whether there is a specific prohibition in regulations, but rather whether the Region has authority to include as co-permittees in a NPDES permit the owners and operators of separately owned satellite collection systems, where those owners did not apply, sign, or certify any application for such a permit. To say, in sum "there is nothing barring us" from issuing a permit falls far short of the mandate set by the EAB in Upper Blackstone and fails to demonstrate any authority to do so.

Third, in choosing to ignore its own regulations, the Region would instead leave it to the whim of its permit writers to determine whether the separately owned collection systems need to apply or reapply to insure compliance with the CWA. The Region states:

> Satellite collection system operators have generally not submitted separate permit applications for coverage under the POTW permit, because the treatment plant operator generally submits the information necessary for the permit writer to write terms and conditions in the permit applicable to all components of the POTW on the basis of the treatment plants' application. Whether or not to require additional information from a satellite collection system by way of an application is separate and apart from whether the collection system should be named as a co-permittee on the POTW permit. Both are case by case decisions, one based on the information available to the permit writer; the second based on whether the permit writer determines that specifying co-permittees on the POTW permit is necessary for all terms and conditions of the permit to be implemented.

(RTC #37). Under the Region's Analysis, the Towns would have no way of knowing whether they need apply, whether information provided by the POTW's permit application is

"necessary," what terms and conditions the permit writer may consider "necessary" or as applicable to them, and whether there is any duty to reapply prior to the Permit's expiration to assure compliance with CWA. The Region's approach is a stunning departure not only from its historic practice of not including owners and operators of collection systems in NPDES permits, but also from the regulatory framework set forth at 40 C.F.R. § 122.21 and in EPA's Permit Writers' Handbook. In short, the "Duty to Apply" at 40 C.F.R. § 122.21(a), providing that "[a]ny person who discharges or proposes to discharge pollutants . . . must submit a complete application . . . in accordance with this section [122.21] and part 124 of this chapter," cannot be taken out of the permitting process, as the Region would have it in order to impose NPDES obligations upon the Towns.

In its Analysis, the Region states it would have "waived" the Towns' permit applications and all requirements of 40 C.F.R. § 122.21. The Region instead now says that it has not waived the application requirement. Rather, it says that it still "required and received an application from the POTW discharge by the District," and has decided to waive the permit application and submittal requirements applicable to the municipal collection systems, including signatory requirements. (RTC #39). The Region claims Section 122.21(j) allows it to do so.

However, nothing in Section 122.21(j) suggests the Region may waive the requirement at 40 C.F.R. § 122.21 (a)(1) mandating an application from those persons who discharge from a point source. Likewise, nothing in Section 122.21(j) suggests EPA may waive the requirement for application signatures and certifications and authorizations required by 40 C.F.R. § 122.22, none of which the Towns have provided. EPA seeks to ignore its own regulations and to issue a permit for which the Towns have not applied and do not consent.

First, the Region cannot unilaterally waive requirements of an application without a request to do so. The person must seek a waiver and that waiver must be approved by EPA. 40 C.F.R. § 122.21(e) requires a complete application before EPA may issue a permit "([EPA] shall not issue a permit before receiving a complete application for a permit"), and a "waiver application" must be made, and approved, or not acted upon by EPA. 40 C.F.R. § 122.21(e)(2) provides:

> A permit application shall not be considered complete if a permitting authority has waived application requirements under paragraphs (j) or (q) of this section and EPA has disapproved the waiver application. If a waiver request has been submitted to EPA more than 210 days prior to permit expiration and EPA has not disapproved the waiver application 181 days prior to permit expiration, the permit application lacking the information subject to the waiver application shall be considered complete.

The Towns have not only made no application for any NPDES permit, they have made no application for a waiver from the application requirements.

Second, § 122.21(j) provides that:

> Permit applicants must submit all information available at the time of permit application. . . . The Director may waive any requirement of this paragraph if he or she has access to substantially identical information. (emphasis supplied).

The Region says that the phrase "any requirement of this paragraph" in 40 C.F.R. § 122.21(j) includes the requirement to submit a waiver application in the first place. (RTC #40). This is nonsense. The duty to seek a waiver stems from 40 C.F.R. § 122.21(e)(2), quoted above. The Region cannot unilaterally waive the waiver application or the need for an application itself. 40 C.F.R. § 122.21(j) says only that the "Director may waive any requirement of this paragraph if he or she has access to substantially identical information." Section 122.21(j) does not trump the requirement at 40 C.F.R. § 122.21(a)(1) mandating an application from those persons who discharge from a point source.

Finally, the Region says it can also waive the signatory requirements because (1) it has a signature from the operator of the POTW, and (2) the signature requirement is included in 40 C.F.R. § 122.21(j), which it can waive too. (RTC #40). The Region ignores the certification required by 40 C.F.R. § 122.22 that is to accompany the signature. Nothing in Section 122.21(j) allows EPA to waive the requirement at 40 C.F.R. § 122.22. Moreover, the process that the Region envisions for permitting co-permittees would cause the Towns to rely solely upon the information about its systems provided in Form 2A, requiring detailed information about the "treatment works" and no information about their collection systems. See Form 2A at http://www.epa.gov/npdes/pubs/final2a.pdf and Exh. B. The application is signed and certified, not by the Towns individually, but instead solely by the operator of the POTW. The Towns have not delegated any such authority to the POTW. Exh. B. As noted above, the Region's proposed permitting scheme inappropriately leaves solely to the permit writers discretion whether a satellite collection system needs to make application for a NPDES permit. The Region should not be allowed to ignore EPA's own regulations and EPA's Permit Writers' Manual in favor of creating a regional interpretation of the CWA, a federal statute equally applicable to all states and EPA regional offices.

As one might expect, EPA's Permit Writers' Manual says nothing about permitting satellite collection systems as part of a greater POTW. Indeed, EPA's Permit Writers' Manual make no reference to permitting of satellite collection systems or to the owner of such systems being subject to a NPDES permit as a co-permittee. See EPA NPDES Permit Writers' Manual, September 2010 http://www.epa.gov/npdes/pubs/pwm_2010.pdf. Instead, the Permit Writers' Manual supports the Towns' position. The Permit Writers' Manual says: "Under the national program, NPDES permits are issued only to direct dischargers." Permit Writers' Manual Section

1.3.4. (emphasis supplied). A "direct discharge" means the "discharge of a pollutant" and "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." (Emphasis supplied). CWA § 502(12),. 40 C.F.R. 122.2.

Section 4.1 of Permit Writers' Manual addresses "Who Applies for a NPDES Permit?" No mention is made in this section to satellite collection systems or to the owners of such systems. Instead, the Permit Writers' Manual states:

> The NPDES regulations at Title 40 of the Code of Federal Regulations (C.F.R.) 122.21(a) require that any person, except persons covered by general permits under § 122.28, who discharges pollutants or proposes to discharge pollutants to waters of the United States must apply for a permit. Further, § 122.21(e) prohibits the permitting authority from issuing an individual permit until and unless a prospective discharger provided a complete application. This regulation is broadly inclusive and ties back to the Clean Water Act (CWA) section 301(a) provision that, except as in compliance with the act, "…the discharge of any pollutant by any person shall be unlawful." In most instances, the permit applicant will be the owner (e.g., corporate officer) of the facility. However, the regulations at § 122.21(b) require that when a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit. The regulations also require the application to be signed and certified by a high-ranking official of the business or activity. The signatory and certification requirements are at § 122.22. Permits (and applications) are required for most discharges or proposed discharges to waters of the United States; however, NPDES permits are not required for some activities as specified under the Exclusions provision in § 122.3.

Permit Writers' Manual, Section 4.1.

Section 4.3. of the Permit Writers' Manual addresses what forms must be submitted and at Exhibit 4-3 describes "the types of dischargers required to submit NPDES application forms, identifies the forms that must be submitted, and references the corresponding NPDES regulatory citation." As with Section 4.1 of the Permit Writers' Manual quoted above, in Section 4.3 there is no mention of satellite collection systems or the need for the owners of such systems to have a NPDES permit.

The Region, in Response at RTC #42, says it can ignore the Permit Writers' Manual, as it is only a guidance and not legally binding. The Region says that to the extent inferences may be

drawn from the Permit Writers' Manual, any inferences support the Region's approach. That is not the case. As noted above, there is nothing in the Permit Writers' Manual that addressees satellite collection systems or owners of such systems as permittees. Further, the Permit Writers' Manual description of POTW in no way supports the Regions' arguments as to the scope of its statutory authority. Instead, the Permit Writers' Manual shows the Region's proposed permitting scheme is without legal foundation, and is irrational, illogical and must be rejected as an error of fact and law.

C. The Region's Approach Is a Legislative Rule that Must Be Subject to Notice and Comment.

1. Court Decisions Do Not Support the Region's Claim That Its Analysis Is Interpretive.

The Region's change in the legal requirements applicable to satellite collection systems is a legislative rule issued without formal notice and comment and rulemaking in violation of the Administrative Procedure Act ("APA"). Despite the Town's prior comments alerting the Region to this issue, Comments #44, #47, the Region has made errors of law and fact and issued the Permit with co-permittee provisions in violation of the APA. The Region's RTC, at RTC #44, #47, fails to address the Region's legal and factual errors identified in the Towns comments.

It is well-established that an agency may not escape the notice and comment requirements by labeling a major substantive legal addition to a rule as a mere interpretation. Appalachian Power Company v. Environmental Protection Agency, 208 F.3d 1015, 1024 (2000). The courts draw a distinction between merely construing a statutory provision and actually supplementing it, stating "instances where an agency merely declare[s] its understanding of what a statute requires" are interpretive, whereas instances "where an agency go[es] beyond the text of a statute " are legislative. American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1110 (1993). In other words, a substantive rule modifies or adds to a legal norm

based on the agency's own authority and because the agency is then engaged in lawmaking, it must comply with the APA's notice and comment requirement. Syncor International Corp. v. Shalala, 127 F.3d 90, 95 (1997). The hallmark of an interpretative rule or policy statement is that it cannot be independently legally enforced. Iowa League of Cities v. Environmental Protection Agency, 711 F.3d 844, 875 (2013). In evaluating whether a rule is legislative or interpretive, a Court must consider "(1) whether in the absence of the rule there would not be adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule." American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1111 (1993) . The presence of any one of these factors renders a purportedly interpretive rule legislative. Syncor International Corp. v. Shalala, 127 F.3d 90, 96 (1997) .

The Region clearly goes beyond the scope of its legislative authority in extending its permitting policies to include municipalities as co-permitees. In the absence of this substantive change in policy, there "would not be adequate legislative basis for enforcement action" against the Towns. American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1111 (1993) . Prior to approximately 2005, municipalities had never been subject to co-permitting in this manner, despite the EPA's history of more than three decades issuing NPDES permits. The Region would not have, and historically has not had, jurisdiction to enforce its policies against the municipalities absent the change proposed by the Region's Analysis. As such, the Region's characterization of its co-permittee practice in its Analysis as "merely interpret[ing] existing statutes and regulations" is misplaced. (RTC #47). The Region advanced this argument in an

effort to avoid the notice and comment requirements that are undeniably necessary to expand its legislative reach and affect the Region's desired change to regulate satellite connection systems.

The Region argues in RTC #47 that the rule could not possibly "effectively amend a prior legislative rule" because it has never "fully promulgated any rules on permitting practices for separately owned satellite collection facilities." As such, the Region contends in its Analysis that it is "simply one way that a permit can be framed to assure compliance with the Act." (RTC #47). This assertion is patently false. The Code of Federal Regulations provides information on the legislative policies with respect to the regulatory scheme for the permit application process; the EPA's Permit Writers' Handbook also offers guidance on how to successfully apply for a permit. The guidance documents and regulations are binding with respect to this issuance of permits because they lead the applicant and/or permit writer to believe that they will not be granted a permit if they fail to conform to the document's "guidance," one of the hallmarks of a binding document. General Electric Company v. Environmental Protection Agency, 290 F.3d 377, 382 (2002). As such, these documents lay out the effective "prior legislative rule," and notably, neither document contemplates co-permittees in the manner alleged by the Region in its Analysis.

The Region's Analysis expands its jurisdiction to include applicants not contemplated as co-permittees in the Code of Federal Regulations or Permit Writers' Handbook and unilaterally grants itself the authority to "waive" the legal requirements for this process as outlined in the Code of Federal Regulations (including, remarkably, the requirements that an applicant sign and certify its permit application), blatantly amending the legislative rule. The Region's Analysis completely ignores the fact that its practice is directly contrary to and inconsistent with the requirements under the Code of Federal Regulations. The mere fact that the Region believes its

Analysis, in all its particulars, is merely one of many interpretations, implying that it is therefore subject to change, does not affect its binding nature. Appalachian Power Company v. Environmental Protection Agency, 208 F.3d 1015, 1022 (2000) . These publications, masked as explanatory guidance or interpretative rules, in their essence, are how "law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations," and they are exactly the type of ad-hoc lawmaking for which the APA notice and comments requirements exist and seek to prevent. Appalachian Power Company v. Environmental Protection Agency, 208 F.3d 1015, 1020 (2000). Where an agency invokes its general rulemaking authority to extend its regulatory reach, its publication is not an interpretative rule. Syncor International Corp. v. Shalala, 127 F.3d 90, 95 (1997) . An agency may not broaden the scope of the original legislation through the implementation of an alleged "policy statement" or "interpretative rule" without fulfilling the notice and comments requirements under the APA. Appalachian Power Company v. Environmental Protection Agency, 208 F.3d 1015, 1024-28 (2000) . But this is exactly what the region has done: the Region has expanded the scope of NPDES jurisdiction to include the owner and operators of satellite collection systems.

In ascertaining whether an agency's action constitutes a legislative rule, a court must consider whether it, "(1) impose[s] any rights and obligations or (2) genuinely leaves the agency and its decision makers free to exercise discretion." General Electric Company v. Environmental Protection Agency, 290 F.3d 377, 382 (2002). While a court may consider other factors such as the agency's characterization of its action and whether the action was published in the Federal Register or the Code of Federal Regulations, "whether the action has binding effects on private parties or the agency," is the most important consideration. Id. Further, an agency statement

will be considered binding if it "appears on its face to be binding" or "is applied by the agency in a way that indicates it is binding." Id. at 383. "A document will have practical binding effect… if the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences…" Id. While "enforcement discretion is relevant in determining whether an agency intended to bind itself… [it] tells one little about whether a rule is interpretive." Syncor International Corp. v. Shalala, 127 F.3d 90, 96 (1997) . Here, there is little doubt the Region's change binds private parties.

The Region argues that that the Analysis is not an immutable, binding rule for all permitting authorities and instead merely "describes the process of listing municipalities" as co-permittee as "EPA Region 1's practice." (RTC #47). However, its argument stops short of a complete consideration of the relevant case law. The Region's Analysis is a binding change in policy because it imposes obligations on the Towns that did not previously exist and, most importantly, "has binding effects on private parties." General Electric Company v. Environmental Protection Agency, 290 F.3d 377, 382 (2002). Merely styling its Analysis as an "interpretative statement" that explains its understanding of the CWA does not negate the fact that it has a binding effect on the Towns who were included as co-permittees. The co-permittees, despite having no intention whatsoever to be included in the permit application, will be subject to adverse consequences for their failure to comply with permitting requirements, despite little to no legal support for their inclusion by the Region and a lengthy history of permitting policies that contradict those outlined in the Analysis. As such, the Region's Analysis signifies a binding, substantive change in its regulatory practices, regardless of whether the Region intended to create such a change, and therefore must be considered a legislative rule subject to the notice and comments requirements under the APA.

2. EPA's Past Rule Making Inquiries Contradict The Region's Analysis And Claim That It Is Interpretive.

EPA's filing of Federal Register notices on two separate occasions concerning proposed NPDES regulatory amendments to address municipal satellite collection systems directly contradicts Region's claim that its Analysis is not a legislative rule subject to notice and public comment under the APA. The Towns raised this issue in their Comments. Comment #44. While the Region did make reference to this comment in RTC #44, the Regions response is conclusory, elusive and erroneous. The Region claims it is entitled to have an interpretation of the CWA and its implementing regulations that is limited to Region 1, that may differ from the rest of the EPA.

EPA inquiries into regulatory amendments to provide authority for regulation of satellite collection systems refute the Region's Analysis and claim to autonomy to regulate such systems. EPA sought through "listening sessions" information from the public concerning permitting of satellite collection systems. See 75 Fed. Reg. 30395 (June 1, 2010) ("EPA is considering whether to propose modifying the [NPDES] regulations as they apply to municipal sanitary sewer collection systems"). In contemplating a potential regulatory change, EPA asked specifically for input on the question: Should EPA propose to require permit coverage for municipal satellite collections systems?

Similarly, in 2001, EPA began a rulemaking that purported to give the EPA direct authority over satellite systems, in the context of a proposed rule pertaining to sanitary sewer systems. See National Pollutant Discharge Elimination System (NPDES) Permit Requirements for Municipal Sanitary Sewer Collection Systems, Municipal Satellite Collection Systems, and Sanitary Sewer Overflows (proposal signed Jan. 4, 2001) (formerly available at http://cfpub.epa.gov/npdes/regresult.cfm?program_id=4&view=all&type=3, but now withdrawn

from EPA's website). EPA later withdrew that proposed rule. Until such time as EPA addresses this issue on a national level and gives the public the opportunity review and comment on the legal Analysis set forth by the Region, co-permittee provisions should not be set forth in the Permit. For these reasons, the co-permittee provisions must be stricken from the Permit.

D. Role of MassDEP Regulations at 314 CMR 12.00, as revised, was not properly considered in issuing the Permit; Regions Actions are unnecessary and inconsistent with MassDEP's current regulations.

The Region fails to explain why the operation and maintenance of the Towns' sewer systems is not being adequately regulated under state regulations at 314 CMR 12.00. See Comment # 49. In its Response, the Region says only that its "Analysis does not depend on the sufficiency or insufficiency of state regulations," and goes on to state, generally, the importance of adequate operation and maintenance of the collection systems in general. (RTC # 49).

In issuing the Permit, the Region failed to consider the April 2014 revisions to 314 CMR 12.00 which include a new section 314 CMR 12.04(2) which replaces MassDEP Policy BRP01-1 with regulations. As part of adopting these new regulations, MassDEP terminated the Policy referenced in the Region's Analysis.[3] As noted in the Towns' comments, the purpose of 314 CMR 12.00 is to insure "proper operation and maintenance of . . . sewer systems within the Commonwealth," and sets forth numerous requirements for the proper operation and maintenance of such systems. See 314 CMR 12.03(4), (10), and (11); 12.04(4); 12.05(5), (6) and (12); and 12.07(7). Comment #49. These MassDEP regulatory provisions are now even more

[3] The Region's Past Practice of Permitting POTWs that include Municipal Satellite Collection Systems references MassDEP Policy No. BRP01-1 "Interim Infiltration and Inflow Policy" which was issued in 2001 to support 314 CMR 12.00: Operation & Maintenance & Pretreatment Standards for Wastewater Treatment Works and Indirect Dischargers. Analysis, p. 5. In its Analysis, the Region also describes that MassDEP Policy BRP01-1 establishes conditions/requirements for POTWs to address I/I and states that "[S]ince September 2001, these requirements have been the basis for the standard operation and maintenance conditions related to I/I..." in NPDES permits issued by the Region. Id. at 5

relevant than when the Analysis, Fact Sheet and Revised Draft Permit were issued as a result of the April 2014 codification of enforceable I/I analysis and plans within MassDEP's regulations.

Unlike the Region, MassDEP has clear legal authority to regulate I/I in collection systems under the April 2014 regulatory revisions though comprehensive, enforceable regulatory requirements. These regulations are better tailored to manage municipal sewer collection systems connected to regional wastewater treatment facilities. In its RTC, the Region recognizes the unique local-control structure nature of New England states as "…unusual nationwide for the strong level of local control exercised by relatively numerous cities and towns (351) leading to at times to extensive collection systems controlled by local authorities but discharging via a regional treatment plant such as the District." (RTC #44). Instead of recognizing the strong role of municipalities in Massachusetts to support the MassDEP regulatory program, the Region attempts unconvincingly to assert that the "home rule" governance structure provides a basis to claim that its Analysis is not in fact an action subject to national rule making requirements. (RTC #44). In sum, the Region's dismissal of the important role of state regulations in the RTC and issuing the Permit without considering the revisions to 314 CMR 12.04(2) typifies the cobbled nature of its arguments and approach to the co-permittee provisions in the Permit.

E. The Unclear Wording of the Permit Leaves Open the Possibility that the District and/or Other Towns Could be Held Responsible for a Town Violation.

The Permit states the Towns "are co-permittee's for the specific activities required in Sections I.B – Unauthorized Discharges and I.C. – Operation and Maintenance of the Sewer System, which includes conditions regarding the operation and maintenance of the several municipal collection systems." Permit at page 1 of 15. At Part I.C. "Operation and Maintenance of the Sewer System, the permit says "[t]he permittee and each co-permittee are required to complete the following activities for the collection system which it owns:…" (emphasis added).

Permit at page 7 of 15. The Permit then lists, in Part I.C., seven (7) specific items: maintenance staff, preventative maintenance program, I/I, collection system mapping, collection system operation and maintenance plan, annual reporting, and alternative power source. Within each of these subsections (1. – 7.), the Permit provides "the permittee and each co-permittee shall . . . ." (emphasis added) carry out actions as to each item. For example, "[t]he permittee and each co-permittee shall provide adequate staff . . .; shall maintain an ongoing preventative maintenance program to prevent overflow and by pass . . ." Permit, at pages 7-9 of 15. In each cited section of the Permit, the responsibility of the Permittee and Co-Permittee are identical and co-terminus leaving the District and Towns potentially liable for the actions or inactions of the permittee and co-permittees identified in the Permit.

Should the Board not strike the co-poermitte provisions, the District's liability for any potential violations by Town co-permittees needs to be clarified. Pursuant to the NPDES regulations, the District, as Permittee, "must comply with all conditions of [the] permit. Any permit noncompliance constitutes a violation of the [CWA] and is ground for enforcement action . . .." 40 CFR 122.41(a). Consequently, and as an example, where the Permit states at Part I. C. 3: "[T]he permittee and each co-permittee shall control [I/I] into the sewer system as necessary to prevent high flow related to unauthorized discharges from their collection systems and high flow related violations of the [WWTP's] effluents limits," (emphasis added) the District by operation of the regulations is liable for a violation by a member Town. Permit, at page 8 of 15.

In sum, the Permit as issued leaves the District, as permittee, and the several Towns, as co-permittees, exposed to liability for violations in satellite collection systems they neither own or operate. The risk for the permittee and co-permittees from enforcement of these vaguely worded provisions is not limited to actions by the Region but also includes the possibility of

citizens suits to enforce these provisions if the same are not removed or properly clarified to limit the scope of responsibility for the permittee and co-permittees.

CONCLUSION

As set forth above, the Region has no legal authority to the include the Towns as co-permittees to the Permit or to regulate municipal satellite collection systems. The Petitioners respectfully seek review by the EAB of the final NPDES Permit and after such review the Petitioners request:

1. The opportunity to present oral argument in this proceeding and supplemental briefing to assist the EAB in addressing the issues raised;

2. A remand to EPA Region 1 with an order to strike all references to and conditions imposed upon the Towns as "co-permittees" in the Permit and otherwise conform to the EAB's findings on the terms and provisions appealed by the Petitioners; and

3. Any such other relief that may be appropriate under the circumstances.

Respectfully submitted,

Upper Blackstone
Water Pollution Abatement
District and the Towns of Bellingham, Franklin,
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By its Attorneys

/s/ _____

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STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this petition for review, including all relevant portions, contains less 14,000 words.

/s/
Robert D. Cox, Jr.

Date: August 27, 2014

ATTACHMENT A
TERMS OR PROVISIONS FROM NPDES
PERMIT NO. MA 0102598 SUBJECT TO PETITIONER'S APPEAL

	Part	**Page of Permit**	**Term or Provision Appealed**	**Subject Matter**
1.		Page 1 of 15	Listing the Towns of Franklin, Medway, Millis and Bellingham as Co-Permittees	Co-Permittee
2.	Part I.B.	Page 7 of 15	Unauthorized Discharges	Co-Permittee
3.	Part I.C.	Pages 7-9 of 15	Operation and Maintenance of the Sewer System	Co-Permittee

CERTIFICATE OF SERVICE

I, Robert D. Cox, Jr., hereby certify that on this 27 day of August, 2014, I served a copy of the foregoing Petition for Review, Statement of Compliance with Word Limitations on the parties identified below by U.S. first class mail, postage prepaid.

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/s/
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