

IN RE CHARLES RIVER POLLUTION CONTROL DISTRICT

NPDES Appeal No. 14-01

ORDER DENYING REVIEW

Decided February 4, 2015

Syllabus

The Massachusetts towns of Franklin, Medway, Millis, and Bellingham (“Towns”) own and operate satellite sewer collection systems that convey wastewater to a wastewater treatment plant (“WWTP”) for treatment and discharge into waters of the United States. The Charles River Pollution Control District (“Charles River”) owns the WWTP, which is part of a publicly owned treatment works. Charles River was the only entity that applied to the U.S. Environmental Protection Agency (“EPA”), Region 1 (“Region”), for a National Pollutant Discharge Elimination System (“NPDES”) permit to authorize discharges from the WWTP pursuant to Clean Water Act section 402, 33 U.S.C. § 1342. Nonetheless, the Region issued the NPDES permit to Charles River *and* to the Towns as co-permittees. Together with the Upper Blackstone Water Pollution Abatement District, the Towns petitioned the Environmental Appeals Board (“Board”) to review both their status as co-permittees and the permit conditions (Parts I.B. and I.C.) that apply to them.

Held: The Board denies the petition for review. The Region has authority under the Clean Water Act and EPA’s regulations to include the Towns as co-permittees to the permit, and the administrative record supports the Region’s decision to include the Towns as co-permittees.

The Region reasonably construed the NPDES regulatory definition of “publicly owned treatment works” (“POTWs”) to include the Towns’ municipal satellite sewer collection systems. Because the Towns’ sewer collection systems are components of a publicly owned treatment works that directly discharges pollutants from the Charles River WWTP into waters of the United States, the Towns are subject to NPDES regulation.

The Board also concludes that the administrative record adequately explains the Region’s decision to treat the Towns as co-permittees. The record includes the Region’s “Permitting Approach” document, which describes the applicability of the NPDES program to POTWs that are composed of municipal satellite sewage collection systems owned by one entity and treatment plants owned by another and provides the Region’s

rationale for directly regulating the Towns through a co-permitting structure. In that document, the Region stated that a co-permitting approach would minimize human health and water quality impacts resulting from excessive inflow and infiltration. Although State regulations also address inflow and infiltration control, the Petitioners failed to address why the Region's approach to control excessive extraneous flow by regulating the Towns is clearly erroneous.

The Region has interpreted the permit as subjecting the Towns to only Parts I.B. and I.C. of the permit, and then only with respect to the portions of the collection system that each Town owns. The Board adopts this interpretation as an authoritative reading of the permit that is binding on EPA.

The Region did not circumvent the NPDES permit application requirements because the duty for the Towns to apply for a permit was met by the Charles River WWTP permit application. The NPDES regulations pertaining to a discharger's "duty to apply" is susceptible to a reading that if, as here, there are multiple dischargers responsible for the same discharge, then an application from one of the dischargers constitutes an application from all. Additionally, the Region appropriately waived the requirement for separate permit applications from the Towns because the Region determined that the information the Towns would provide in their applications would be "substantially identical" to information provided in the WWTP's application.

The Region's Permitting Approach is not a legislative rule. An adequate basis exists under EPA regulations to regulate satellite collection systems in the document's absence, and the document does not amend a prior rule. The Board upholds the Region's decision to regulate satellite systems as co-permittees based on the Clean Water Act and EPA regulations, not on the Permitting Approach.

Before Environmental Appeals Judges Leslye M. Fraser, Randolph L. Hill, and Kathie A. Stein.

Opinion of the Board by Judge Hill:

I. STATEMENT OF THE CASE

Four Massachusetts towns – Franklin, Medway, Millis, and Bellingham ("Towns") – and the Upper Blackstone Water Pollution Abatement District together petition the Environmental Appeals Board ("Board") to review certain conditions of a National Pollutant Discharge Elimination System ("NPDES") permit that authorizes discharges from the Charles River Pollution Control District's Wastewater Treatment Plant ("WWTP") in Medway, Massachusetts, to the Charles River. The U.S. Environmental Protection Agency, Region 1 ("Region"), issued the permit on July 23, 2014, pursuant to Clean Water Act ("CWA") section 402, 33 U.S.C. § 1342.

Petitioners challenge the permit terms that treat the Towns as “co-permittees” with responsibility to comply with a small subset of the permit’s requirements. The National Association of Clean Water Agencies¹ (“NACWA”) is participating as amicus curiae and supports the challenge to the co-permittee provisions.

Petitioners claim that the Region clearly erred in imposing these requirements on the Towns as part of the NPDES permit for the Charles River Pollution Control District WWTP. The Towns own satellite sewer collection systems that convey wastewater to the WWTP for treatment and discharge. The Charles River Pollution Control District, which the Towns claim is the sole discharger of pollutants to waters of the United States, is the only entity that applied for the NPDES permit. Petitioners seek a remand directing the Region to strike all references to and requirements imposed upon the Towns as “co-permittees” in the permit. For the reasons discussed below, the Board denies the petition for review.

II. PRINCIPLES GUIDING BOARD REVIEW

Under 40 C.F.R. § 124.19, the Board has discretion to grant or deny review of a permit decision. Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). Ordinarily, the Board will deny review of a permit decision and thus not remand it unless the permit decision either is based on a clearly erroneous finding of fact or conclusion of law, or involves a matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a)(4)(i)(A)-(B); *accord, e.g., In re Prairie State Generating Co.*, 13 E.A.D. 1, 10 (EAB 2006), *aff’d sub nom. Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007); *see also* Revisions to Procedural Rules Applicable in Permit Appeals, 78 Fed. Reg. 5,281, 5,282 (Jan. 25, 2013). In considering whether to grant or deny review of a permit decision, the Board is guided by the preamble to the regulations authorizing appeal under part 124, in which the Agency stated that the Board’s power to grant review “should be only sparingly exercised” and that “most permit conditions should be finally determined at the [permit issuer’s] level.” 45 Fed. Reg. at 33,412; *see also* 78 Fed. Reg. at 5,282.

¹ NACWA “is a voluntary, non-profit trade association representing the interests of the nation’s publicly-owned wastewater and stormwater utilities. NACWA’s members include nearly 300 of the nation’s municipal clean water agencies * * * .” NACWA Br. at 1.

The burden of demonstrating that the Board should review a permit decision rests with the petitioner. 40 C.F.R. § 124.19(a)(4). A petitioner seeking review must demonstrate that any issues and arguments it raises on appeal have been raised previously in comments on the draft permit and thus preserved for Board review, unless the issues or arguments were not reasonably ascertainable before the close of the public comment period. 40 C.F.R. §§ 124.13, .19(a)(4)(i); *see In re City of Moscow*, 10 E.A.D. 135, 141 (EAB 2001); *In re City of Phoenix*, 9 E.A.D. 515, 524 (EAB 2000). Assuming that the issues have been preserved, the petitioner must specifically state its objections to the permit and explain why the permit issuer's previous responses to those comments were clearly erroneous or otherwise warrant review. 40 C.F.R. § 124.19(a)(4)(i)-(ii); *see, e.g., In re Teck Cominco Alaska, Inc.*, 11 E.A.D. 457, 494-95 (EAB 2004); *In re Westborough*, 10 E.A.D. 297, 305, 311-12 (EAB 2002); *In re City of Irving*, 10 E.A.D. 111, 129-30 (EAB 2001), *review denied sub nom. City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003).

When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit decision to determine whether the permit issuer exercised his or her "considered judgment." *See, e.g., In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 191, 224-25 (EAB 2000); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997). The permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied upon when reaching its conclusion. *E.g., In re Shell Offshore, Inc.*, 13 E.A.D. 357, 386 (EAB 2007). As a whole, the record must demonstrate that the permit issuer "duly considered the issues raised in the comments" and ultimately adopted an approach that "is rational in light of all information in the record." *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002); *accord City of Moscow*, 10 E.A.D. at 142; *In re NE Hub Partners, LP*, 7 E.A.D. 561, 567-68 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999). On matters that are fundamentally technical or scientific in nature, the Board typically will defer to a permit issuer's technical expertise and experience, as long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record. *See In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 510, 560-62, 645-47, 668, 670-74 (EAB 2006); *see also, e.g., In re Russell City Energy Ctr.*, 15 E.A.D. 1, 29-32, 66 (EAB 2010), *pet. denied sub nom. Chabot-Las Positas Cmty. Coll. Dist. v. EPA*, 482 F. App'x 219 (9th Cir. 2012); *NE Hub*, 7 E.A.D. at 570-71.

In reviewing an exercise of discretion by the permit issuer, the Board applies an abuse of discretion standard. *See In re Guam Waterworks Auth.*,

15 E.A.D. 437, 443 n.7 (EAB 2011). The Board will uphold a permit issuer's reasonable exercise of discretion if that decision is cogently explained and supported in the record. *See Ash Grove*, 7 E.A.D. at 397 (“[A]cts of discretion must be adequately explained and justified.”); *see also Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (“We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner * * *.”).

III. PROCEDURAL AND FACTUAL HISTORY

The Charles River Pollution Control District (“Charles River”) owns and operates a wastewater treatment plant (“WWTP”) in Medway, Massachusetts, that is part of a publicly owned treatment works (“POTW”). The WWTP discharges into a water of the United States. The four Towns own satellite sewer collection systems that convey wastewater to Charles River’s WWTP for treatment and discharge. Town-owned satellite sewer collection systems consist of approximately 227 miles: 125 miles owned by Franklin, 53 miles owned by Medway, 27 miles owned by Millis, and 22 miles owned by Bellingham. Charles River owns and operates the remaining 13 miles of interceptor lines. In total, over 238 miles of sewer lines convey wastewater to the Charles River WWTP.

A. Permit

In June 2004, Charles River applied to renew its NPDES permit to discharge from the WWTP. The Region released a draft permit in 2008 for public review and comment. Although none of the Towns had submitted an NPDES permit application to the Region, the 2008 draft permit included the Towns for the first time as co-permittees with Charles River. Fact Sheet for the Revised Permit (“Fact Sheet”) at 5 (Administrative Record (“A.R.”) A.26). While the 2008 draft permit was pending, this Board issued its decision in *In re Upper Blackstone Water Pollution Abatement District*, 14 E.A.D. 577 (EAB 2010). The issues raised in *Upper Blackstone* also concerned the Region’s co-permittee approach, but involved different municipalities and a different wastewater treatment plant than the instant case.

In the *Upper Blackstone* decision, the Board questioned the Region’s approach of including municipalities that owned satellite sewer collection systems as co-permittees of a permit issued to a POTW treatment plant. 14 E.A.D. at 585-91. The Board concluded that the Region had not adequately explained its reasoning for including several municipalities as co-permittees with the owner/operator of the wastewater treatment plant. *Id.* at 591. Accordingly, the Board remanded that issue to the Region.

Charles River, Charles River Watershed Association, and the Towns of Franklin, Medway and Millis submitted comments on the 2008 draft permit. *See* EPA and MassDEP Joint Response to Public Comments (“RTC”) 1 (A.R. B.1). In 2012, the Region released another draft permit for the Charles River WWTP, which continued to propose including the Towns as co-permittees because of their ownership of their respective sewer collection systems. Fact Sheet at 5. The Region provided its legal theory for including the Towns as co-permittees in an attachment to the Fact Sheet, the “EPA Region 1 NPDES Permitting Approach for Publicly Owned Treatment Works that Include Municipal Satellite Sewage Collection Systems” (“Permitting Approach”) document. *Id.* In the Permitting Approach, the Region explained it was necessary to include the Towns as co-permittees to address problems of wet weather infiltration and inflow into the Charles River sewer system. Fact Sheet, Attach. 1 (“Permitting Approach”), Attach. A (“Analysis”) at 7 (identifying when it would be appropriate to include satellite system owners and operators as co-permittees for permits issued to regionally integrated treatment works) (A.R. K.1); *see also* Analysis Ex. B at 19-21 (identifying the Charles River WWTP as experiencing excess influent flows during wet weather periods, which is evidence of excessive infiltration and inflow); Analysis Ex. B at 22 (identifying the Charles River WWTP as experiencing permit violations associated with wet weather infiltration and inflow).

The Towns, Charles River,² and the Upper Blackstone Water Pollution Control Abatement District submitted comments on the 2012 draft permit that raised the same challenges to the draft permit as the petition now before the Board. *See* RTC at 75-87. The Region responded to comments on both the 2008 and 2012 draft permits and issued the final permit in 2014, which retained the co-permittee provisions.

B. *Permitting Approach Document*

The Region prepared the Permitting Approach and its attached Analysis to respond to concerns the Board raised in the *Upper Blackstone* decision. Analysis at 1; *see also* 14 E.A.D. at 590-91 & n.17 (describing concerns). The Permitting Approach, which was finalized in 2012, Oral Arg. Tr. at 89, addresses “the applicability of the [NPDES] program to publicly owned treatment works (‘POTWs’) that are composed of municipal satellite sewage collection systems

² Charles River did not petition for review of the permit. Its comments address the inclusion of the Towns as co-permittees and other issues that are not raised in this permit appeal. RTC at 51-58.

owned by one entity and treatment plants owned by another (‘regionally integrated POTWs’).” Permitting Approach at *i*. In particular, the Region states its practice is to “directly regulate, if necessary, the owners/operators of the municipal satellite collection systems through a co-permitting structure” on a case-by-case basis to ensure that human health and water quality impacts from excessive extreme flow are minimized. *Id.* at *i-1*.

The decision to subject all portions of a POTW, including satellite collection systems, to NPDES permitting requirements in appropriate cases arises from the Agency’s national policy goal of ensuring that sanitary sewer systems adhere to strict design and operational standards. *Id.* The Region explained in the Permitting Approach that

[b]ecause ownership/operation of a regionally integrated POTW is sometimes divided among multiple parties, the owner/operator of the treatment plant many times lacks the means to implement comprehensive, system-wide operation and maintenance (“O & M”) procedures. Failure to properly implement O & M measures in a POTW can cause, among other things, excessive extraneous flow (*i.e.*, inflow and infiltration³) to enter, strain and occasionally overload treatment system capacity.

Id.; *see also* Analysis at 5. Sanitary sewer systems, while neither designed nor intended to “collect large amounts of runoff from precipitation events or [to] provide widespread drainage[,]” are able to “handle minor and controllable amounts of extraneous flow (*i.e.* inflow and infiltration, or I/I) that enter the system” during periods of high groundwater or stormwater events. Analysis at 3. However, as the Region further explained, many sanitary sewer systems are aging. *Id.* “When the structural integrity of a municipal sanitary sewer collection system deteriorates, large quantities of infiltration (including rainfall-induced infiltration) and inflow can enter the collection system, causing it to overflow. These extraneous flows are among the most serious and widespread operational challenges confronting treatment works.” *Id.*

The Region asserted that “a POTW’s ability to comply with CWA requirements depend[s] on successful operation and maintenance of not only the treatment plant but also the collection system.” *Id.* at 6. Yet, the Region noted

³ “Inflow generally refers to water other than wastewater — typically precipitation like rain or snowmelt — that enters a sewer system through a direct connection to the sewer. Infiltration generally refers to other water that enters a sewer system from the ground, for example through defects in the sewer.” Analysis at 3.

wide variation in “[t]he [legal] ability and/or willingness of regional sewer districts to attain meaningful I/I efforts” in satellite collection systems owned or operated by member communities. Furthermore, relying on the regional districts to ensure proper infiltration and inflow controls “tend[s] to make it difficult for EPA to enforce the implementation of meaningful I/I reduction programs” in such communities. *Id.* The Region ultimately concluded that it may be necessary to include satellite systems as “co-permittees to a limited set of O&M-related conditions on permits issued for discharges from regionally integrated treatment works.” *Id.* at 7. In particular, the Region stated:

the inclusion of the satellite systems as co-permittees may be necessary when high levels of I/I dilute the strength of influent wastewater and increase the hydraulic load on treatment plants, which can reduce treatment efficiency * * *. Excess flows from an upstream collection system can also lead to bypassing a portion of the treatment process, or in extreme situations make biological treatment facilities inoperable * * *.

Id. at 15-16.

The Region appended three exhibits to the Analysis. Exhibit A lists permits the Region has issued to POTWs that included municipal satellite collection systems as co-permittees. Exhibit B is an analysis of extraneous flow trends and sanitary sewer overflow reporting for the South Essex Sewer District and the Charles River Pollution Control District. The analysis in Exhibit B shows a correlation between periods of wet weather and levels of flow to the Charles River WWTP, *id.* at 19-21, and further shows a correlation between effluent limit violations at the Charles River WWTP and periods of wet weather flows, *id.* at 22. Exhibit C is a blank form letter from the Regional Administrator to owners of municipal satellite sewage collection systems, waiving municipalities operating satellite collection systems from NPDES permit application and signatory requirements.

C. Permit Appeal

The Towns, along with the Upper Blackstone Water Pollution Abatement District, challenge permit conditions at Parts I.B. and I.C., which are the sole provisions that apply to the Towns. Part I.B. limits authorized discharges only to the outfall listed in the permit (that is, from the Charles River WWTP). Part I.C. pertains to the operation and maintenance of the sewer systems. Specifically, Part I.C. requires Charles River and the Towns to (1) maintain adequate staff to carry out the functions to comply with the permit, (2) maintain a specified preventative maintenance program, (3) control infiltration and inflow, (4) map the sewer

collection that each entity owns, (5) develop and implement a Collection System Operation and Maintenance Plan for the collection system that each entity owns, (6) submit an annual report, and (7) provide an alternate power source sufficient to operate the portion of the publicly owned treatment works that each entity owns.

Petitioners and amicus curiae NACWA make five basic arguments against the co-permittee provisions. First, they argue that the language of the Clean Water Act and the NPDES regulations do not authorize the inclusion of satellite sewer collection system owners as co-permittees of a permit for a publicly owned treatment works (“POTW”) treatment plant. In particular, Petitioners challenge the Region’s reliance on a statutory definition of POTW to interpret the NPDES permitting provisions imposed here because, Petitioners contend, the statutory definition applies only to the Clean Water Act program for federal grants and loans to municipalities, not to the NPDES regulatory program. Petition at 9.

Second, Petitioners argue that there is only one discharge point through which wastewater is discharged to waters of the United States – the outfall named in the permit – and the Towns do not own the outfall. *Id.* at 7. Therefore, the Towns do not need a permit because they are conveying their wastewater to the POTW treatment plant, not discharging directly into the waters of the United States themselves. *Id.*

Third, Petitioners argue that the Towns are indirect dischargers, which are excluded from NPDES permitting requirements. *Id.* at 11.

Fourth, Petitioners contend that existing Massachusetts regulations adequately regulate the operation and maintenance of the Towns’ sewer systems, obviating the need for the co-permittee provisions in the NPDES permit for Charles River. *Id.* at 27.

Last, Petitioners contend that the Region’s Permitting Approach is a legislative rule that must undergo notice and comment under the Administrative Procedure Act, and thus the permit is invalid because the Region relied on the Permitting Approach as legal authority for the permit. *Id.* at 21.

IV. ANALYSIS

Congress enacted the Clean Water Act “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” CWA § 101(a), 33 U.S.C. § 1251(a). To achieve this objective, the Act prohibits the discharge of pollutants into the waters of the United States, unless authorized by

an NPDES or other Clean Water Act permit. *See* CWA §§ 301(a), 402, 33 U.S.C. §§ 1311(a), 1342. The term “discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.” CWA § 502(12), 33 U.S.C. § 1362(12). A “point source” is “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit * * * from which pollutants are or may be discharged.” CWA § 502(14), 33 U.S.C. § 1362(14); *accord* 40 C.F.R. § 122.2.

A. The Region Has Authority Under the Clean Water Act and EPA’s Regulations to Include the Towns as Co-Permittees to the Permit

Because the Towns are part of a POTW and are contributing to the discharge from the Charles River WWTP, the Towns are “discharging pollutants from a point source” as defined in the Clean Water Act. Accordingly, the Towns are subject to federal NPDES permitting requirements, and the Region has legal authority to include the Towns as co-permittees to the permit.

1. The Towns Discharge Pollutants From a Point Source

a. The POTW Is the Point Source and the Towns’ Collection Systems Are Part of the POTW

The parties do not dispute that the Charles River WWTP is a point source discharging pollutants into waters of the United States. In designating the Towns as co-permittees, the Region concluded, consistent with the Clean Water Act and EPA’s implementing regulations, that the municipal satellite sewer collection systems *together with* the treatment plant comprise the POTW. *E.g.*, RTC at 59-60 (“[The towns] operate portions of the POTW * * * .”), 61-62 (same); *see also*, *e.g.*, Oral Arg. Tr. at 62 (“We are viewing the POTW as a single entity, [with] multiple contributing dischargers.”), 67 (“[Charles River] is a single integrated POTW made up both of a treatment plant and the collection facilities”).

Clean Water Act subchapter III sets forth the effluent limitations and other regulatory programs of the Act, and subchapter IV sets forth the permit requirements pursuant to the Act. Nevertheless, the definition of “publicly owned treatment works” as applied to the NPDES permit program is found elsewhere in the Act, in subchapter II. As described in more detail below, the definition of POTW in the relevant NPDES permit regulations cross-references the definition of POTW in the general pretreatment regulations. These general pretreatment regulations then cross-reference subchapter II, which implemented the original construction grants program and now implements the State revolving loan fund

program. *See* CWA § 603, 33 U.S.C. § 1383 (water pollution control revolving loan funds).

Under the NPDES permit regulations at 40 C.F.R. § 122.2, a “POTW is defined at § 403.3 of this chapter.” 40 C.F.R. § 122.2. Section 403.3(q) in turn provides:

The term Publicly Owned Treatment Works or 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). This definition of [POTW] includes any devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature. It also includes sewers, pipes and other conveyances only if they convey wastewater to a POTW Treatment Plant.

Id. § 403.3(q). CWA section 212 states that the term “treatment works” includes “sewage collection systems, pumping, power and other equipment, and their appurtenances” and “sanitary sewer systems.” CWA § 212(2)(A)-(B), 33 U.S.C. § 1292(2)(A)-(B).

There seems to be no dispute that the satellite collection systems owned by the Towns fall within the language of the section 212 definition of “treatment works.”⁴ Petitioners contend, however, that the definition in CWA section 212 is

⁴ In describing the extent or scope of a POTW, the Region relies on the definition of “sewage collection system” found in the construction grants regulations. Using this definition of “sewage collection system” is reasonable because the definition appears in the provisions pertaining to grants specifically for POTWs, 40 C.F.R. part 35, subpart E. Additionally, the term “sewage collection system” expressly appears in the definition of POTW in CWA section 212.

The Region reasoned that a POTW, and thus NPDES jurisdiction:

extends beyond the treatment plant to the outer boundary of the municipally-owned sewage collection systems, that is, to the outer bound of those sewers whose purpose is to transport wastewater for others to a POTW treatment plant for treatment * * *.

* * * *

Put otherwise, a municipal satellite collection system is subject to NPDES jurisdiction under the Region’s approach insofar as it transports wastewater for others to a POTW treatment plant for treatment.

Analysis at 11 (citing 40 C.F.R. § 35.905).

limited to subchapter II because section 212 states that its definitions are “as used in this subchapter.” CWA § 212, 33 U.S.C. § 1292, *quoted in* Petition at 9. Petitioners acknowledge that section 212 defines “treatment works” broadly; however, according to Petitioners, the definition of “treatment works” in section 212 does not extend to the meaning of the term in section 301 pertaining to the prohibition of discharge of pollutants into waters of the United States. Petition at 10 (quoting *Montgomery Env't'l Coal. v. Costle*, 646 F.2d 568, 591 (D.C. Cir. 1980)). By extension, therefore, the definition of POTW in section 212 does not apply to the NPDES permit requirements in section 402.

Petitioners' reliance on the *Costle* case is misplaced. That case involved discharges from overflow points in a combined sewer system upstream of a POTW treatment plant. *E.g.*, *Costle* 646 F.2d at 589. The D.C. Circuit addressed whether the secondary treatment requirements of CWA section 301(b)(1)(B), 33 U.S.C. § 1311(b)(1)(B), which apply to discharges from POTWs, also apply to the overflow discharges. *Costle* 646 F.2d. at 589-92. The court only held that the discharges from the combined system did not constitute discharges from the POTW and therefore were not subject to secondary treatment requirements. *Id.* at 592. The court never addressed the issues in this case; i.e., whether the portions of the sewer system upstream of the treatment plant are part of the “POTW,” and if so, whether the operator of the upstream portion is therefore responsible for the discharge from the treatment plant.

Petitioners further point out that EPA did not add the reference in 40 C.F.R. § 122.2 to § 403.3(q) – and by extension to the definition in CWA section 212 – to its NPDES regulations until 2000. Reply at 6. Petitioners further note that the preamble to the regulations states that the addition of “references to definitions that are found elsewhere in [40 C.F.R.] parts 122, 123, and 403 * * * was intended to assist readers in finding specific provisions in the NPDES regulations and was not intended to expand the application of those definitions if they are restricted to a particular section.” Amendments to Streamline the

Petitioners argue that the Board rejected this same argument in the *Upper Blackstone* decision, and therefore, the Board should once again reject the argument. Petition at 13. The Board disagrees. The Board remanded the permit challenged in *Upper Blackstone* because the Region failed to “apply a reasonably precise distinction, other than property boundaries, identifying where the collection system ends and a user begins, [and] that distinction is not expressed in the administrative record of this proceeding.” 14 E.A.D. 577, 588 (EAB 2010). For the reasons discussed in Part IV.A of this decision, the Board finds that the administrative record in this permitting decision addresses its concerns in *Upper Blackstone* regarding the scope of a POTW.

National Pollutant Discharge Elimination System Program Regulations: Round Two, 65 Fed. Reg. 30,886, 30,888 (May 15, 2000), *quoted in part in Reply* at 7. From this, they argue that EPA did not intend to expand the definition of POTW to include the collection system portions in the NPDES regulations and that the Region cannot rely on that definition. Reply at 7.

Even prior to the 2000 regulation, EPA clearly intended the definition of POTW to encompass the CWA section 212 definition for purposes of both the NPDES and the pretreatment programs. When EPA promulgated the pretreatment regulations in 1981, the definition of POTW was intended to reference the CWA section 212 definition. *See General Pretreatment Regulations for Existing and New Sources*, 46 Fed. Reg. 9404, 9416, 9440 (Jan. 28, 1981) (redirecting 40 C.F.R. pt. 403 definition of POTW to CWA § 212). In turn, EPA made clear that it intended the definition of POTW in 40 C.F.R. part 403 to be the same as in part 122. *Id.* (“The definition of POTWs in the general pretreatment regulations conforms to the definition of the term found in 122.3 of the Consolidated Permit regulations.”).⁵ The scope of the definition of “POTW” upon which the Region relies is the same as it was since at least 1981.

In sum, Petitioners have not persuaded the Board that using the CWA section 212 definition of POTW is unreasonable, particularly when the NPDES permitting regulations now specifically cross-reference section 212 and previously cross-referenced the section 212 definition implicitly. Accordingly, the Region reasonably construed the Act and its implementing regulations to broadly define POTW to include not only wastewater treatment plants but also the sewer systems and associated equipment that collect wastewater and convey it to those treatment plants. POTW treatment plants, like the satellite sewage collection systems that convey wastewater to the plants, are components of a POTW. Therefore, in this case, the Towns’ satellite sewage collection systems and the permitted facility comprise the POTW, which discharges from a point source.

b. *The Towns Are Discharging Through the Point Source Outfall From the POTW*

In this case, more than one legal person is discharging pollutants from the same point source, i.e., the outfall at the Charles River wastewater treatment plant, which is a portion of the POTW. As discussed in the previous section, the

⁵ EPA renumbered 40 C.F.R. § 122.3 to § 122.2 in 1983. *Environmental Permit Regulations*, 48 Fed. Reg. 14,146, 14,149 (Apr. 1, 1983).

POTW includes not only the Charles River WWTP but also several municipal satellite sewage collection systems. The Towns own and operate approximately 95 percent of the sewer lines comprising the “sewer collection system that transports sewer flow to a wastewater treatment plant for treatment and discharge to U.S. waters.” Petition at 2. While it is true that the Towns do not own or operate the Charles River WWTP and the discharging outfall,⁶ they are nonetheless responsible for pollutants that are conveyed to waters of the United States from the WWTP outfall. Construing those portions of the POTW that are upstream of treatment facility as also “discharg[ing] a pollutant” is consistent with the line of cases that provide that persons who discharge pollutants through conveyances owned by another entity may be subject to NPDES permit requirements. *E.g.*, *United States v. Ortiz*, 427 F.3d 1278, 1284 (10th Cir. 2005) (holding facility owner liable for discharging pollutants through sanitary sewer system that connected to storm drain owned and operated by another entity and flowed to waters of the United States); *San Francisco Baykeeper v. W. Bay Sanitary Dist.*, 791 F. Supp. 2d 719, 771 (N.D. Cal. 2011) (NPDES permit required for owner of collection system discharging sanitary sewer overflow into waters of the United States via municipal separate storm sewer owned by another entity); *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945, 947 (W.D. Tenn. 1976) (holding defendant liable for discharges exceeding NPDES permit limits into city wastewater collection system that subsequently flowed into navigable waters); *see also* 40 C.F.R. §§ 122.26(a)(4), (a)(5) (industrial stormwater discharges through municipal storm sewer system), 122.44(m) (discharges through privately owned treatment works); *Dague v. Burlington*, 935 F. 2d 1343, 1354-55 (2d Cir. 1991) (affirming district court holding that city discharged pollutants without a permit when pollutants from city’s landfill entered pond and

⁶ Pursuant to Massachusetts law, the Charles River Pollution Control District Commission (“Commission”) governs Charles River. Mass. Gen. Laws ch. 21, § 29; Letter from Robert D. Cox, Jr., Bowditch & Dewey, to Eurika Durr, Env’tl. Appeals Bd., U.S. EPA, at 1-2 (Dec. 22, 2014). Two of the Towns, Franklin and Medway, constitute “member” towns of Charles River and together have five representatives on the Commission who are appointed by the Franklin Town Council and the Medway Board of Selectmen. Letter from Janice Kelley Rowan, Warner & Stackpole, to Anthony V. DePalma, Region 1, U.S. EPA, at 1 (Oct. 18, 1993) (A.R. K.4). The remaining towns, Bellingham and Millis, are “customer” towns of the Charles River and are not represented on the Commission. *Id.* at 2.

flowed through culvert into navigable waters), *rev'd in part on other grounds*, 505 U.S. 557 (1992); Response to Comments at 62 (discussing cases).⁷

c. *The Towns Are Not Indirect Dischargers*

Finally, the Towns are not “indirect dischargers” excluded from NPDES permitting. See 40 C.F.R. § 122.3(c). An “indirect discharger” is “any non-domestic” source regulated under the Clean Water Act pretreatment standards that introduces pollutants into a POTW. *Id.* § 403.3(i); see also *id.* § 122.2 (defining indirect discharger as “a non-domestic discharger introducing ‘pollutants’ to a ‘publicly owned treatment works’”). Sources of indirect discharges are “industrial users.” *Id.* § 403.3(j). In this case, the satellite sewer collection systems collect and convey wastewater from *domestic* sources to the POTW treatment facility, and there is no indication that the satellite sewer collection systems are industrial users. Therefore, they are not indirect dischargers as defined in the regulations.⁸

⁷ This conclusion holds whether or not the satellite collection systems comprise part of the POTW. This is because the point source is the discharge outfall from the Charles River WWTP, and the Towns are responsible in part for the pollutants discharged from that point source given they operate conveyances that carry wastewater to that point source. Accordingly, the Towns are engaged in the “discharge of a pollutant” even if only the WWTP is the “POTW.” As the Region explained at oral argument, the Region expressly concluded in the administrative record that the satellite collection systems are part of the POTW to address the Board’s concern in the *Upper Blackstone* decision that lack of such a clear delineation could be read as requiring household contributors of domestic sewage to the POTW to obtain an NPDES permit because they also “discharge” pollutants through the POTW to navigable waters. Oral Arg. Tr. at 56-58; see also Analysis at 11. The Region thus stated in the administrative record that the domestic users of the POTW are excluded from the requirement to obtain a permit. Analysis at 11. The Region does not read NPDES jurisdiction as extending to domestic households, nor does the Board.

⁸ Petitioners also assert that the Agency’s NPDES Permit Writers’ Manual supports their position because “NPDES permits are issued only to direct dischargers.” Petition at 19 (quoting Office of Wastewater Management, U.S. EPA, EPA-933-K-10-001, *NPDES Permit Writers’ Manual* at 1-7 (Sept. 2010)). This argument presupposes that the Towns are indirect dischargers. The Towns, as discussed above, are discharging pollutants from the POTW treatment plant. Therefore, they are legally “direct dischargers” (not “indirect dischargers”), and the Permit Writers’ Manual is not contradictory.

2. *The Region Has Authority and Discretion to Regulate Excessive Inflow and Infiltration Notwithstanding Applicable State Regulations*

The existence (and revision) of Massachusetts regulations addressing inflow and infiltration control does not diminish the Region's authority to permit the Towns under the Clean Water Act. Petitioners allege that the Region failed to consider revisions to Massachusetts regulations that address operation and maintenance requirements for sewer systems. Petition at 27 (citing 314 Mass. Code Regs. 12.04(2)). According to Petitioners, these regulations replace a Massachusetts Department of Environmental Protection ("MassDEP") policy document referenced in the Region's Permitting Approach and Analysis. *Id.* Petitioners argue that "[t]hese regulations are better tailored to manage municipal sewer collection systems connected to regional wastewater treatment facilities" than the Region, and "MassDEP has clear legal authority to regulate I/I in collection systems* * *." *Id.* at 28.

Here, the Region evaluated flow data from the Charles River WWTP to conclude that it was "receiving high levels of inflow and wet weather infiltration." Analysis Ex. B at 19. Because of the excessive inflow and infiltration at the WWTP, the Region decided to include the Towns as co-permittees. Analysis at 6 (citing *id.* Ex. B). The Towns commented that the Region failed to adequately and properly support the analysis in the Permitting Approach upon which the Region relied to include the Towns as co-permittees. RTC at 80-81 (Comment 48). Specifically, the Towns stated that "nothing in the [F]act Sheet or [Permitting Approach] indicates that [sanitary sewer overflows] or I/I is not being addressed by some or all of the towns or is a problem that requires or calls for one or more of the Towns to be identified as a co-permittee in this permit, or that co-permittee status may advance any I/I or SSO problem." *Id.* The Region responded that it "need not show that the specific Towns * * * failed to adequately reduce I/I" because the Agency sought a comprehensive POTW-wide approach for POTWs owned by multiple parties. *Id.* at 81. Such an approach did "not necessarily turn on the performance of any particular Town." *Id.* The Region then stated that "State regulations, while welcome, are not subject to EPA enforcement and are not a substitute for permit requirements." *Id.* at 82.

Although Petitioners are dissatisfied with the Region's statement that the Permitting Approach "does not depend on the sufficiency or insufficiency of state regulations," Petitioners do not demonstrate the contrary, that the state regulations supersede the Region's authority to regulate the Towns, or that the Region's response to comments was otherwise inadequate. Rather, the crux of Petitioners' contention is that because Massachusetts regulations address excessive inflow and

infiltration, the Region need not include the Towns as co-permittees to address these concerns. *E.g.*, Petition at 28 (“These regulations are better tailored to manage municipal sewer collection systems connected to regional wastewater treatment facilities.”). According to Petitioners, the Region should rely on the Massachusetts regulations to resolve I/I issues at the POTW, rather than directly regulating the Towns whose collection systems comprise the POTW. *E.g.* Oral Arg. Tr. at 45 (noting “other approaches” to addressing I/I “such as the State regulation”).

Petitioners fail to address why the Region’s approach to control excessive inflow and infiltration by regulating the Towns is clearly erroneous. In their petition, Petitioners do not dispute the explanation the Region provided in the Response to Comments. The Agency’s authority to regulate the Towns’ satellite sewer systems arises from their status as contributors to the discharge from the outfall listed in the Permit, and Petitioners have failed to explain how the existence of state regulations regarding sewer systems diminishes this authority or why the Region’s conclusion that permit controls on the satellite systems are necessary to control excessive I/I is clearly erroneous.

3. *The Towns Are Responsible Only for Portions of the Collection System That They Own or Operate*

Petitioners also claim that the Towns’ responsibility to comply with the provisions of the permit other than Parts I.B. and I.C. is unclear, and that each of the Towns risks liability from EPA or citizen enforcement if the Charles River Pollution Control District or other Towns fail to comply with the permit. Oral Arg. Tr. at 43, 108; Petition at 29. The Region responds that the Permit conditions that are applicable to the Towns, Parts I.B. and I.C., limit each co-permittee’s responsibility to “the collection system *which it owns.*” Response at 48 (quoting EPA Region 1, Authorization to Discharge Under the National Pollutant Discharge Elimination System, NPDES Permit No. MA0102598, at 7, pt. I.C. (July 23, 2014) (“Permit”) (A.R. A.1)) (quotations omitted). As the Region further elaborates,

the Permit holds the [Charles River Pollution Control] District and Towns responsible *only* for portions of the collection system that they own or operate. * * * * The Region reaffirms its consistent reading of the Permit, which reflects Petitioners’ desired interpretation: each permittee is *only* responsible for actions with respect to the portions of the collection system that it owns and operates, and is *not* liable for violations relative to portions of the collection system operated by others.

Id. at 48-49 (citing Fact Sheet at 6; Analysis at 7) (citations omitted) (emphases in original).

The language of the permit is clear on its face that the Towns are subject only to Parts I.B. and I.C., and then only with respect to the portions of the collection system that each Town owns. *See* Permit at 1, 7 (“The permittee and each co-permittee are required to complete the following activities for the collection system which it owns.”). In addition, the Region’s statements in the record confirm that reading. The Board adopts the Region’s interpretation as “an authoritative reading of the permit that is binding on the Agency.” *In re Austin Powder Co.*, 6 E.A.D. 713, 717 (EAB 1997); *see In re Amoco Oil Co.*, 4 E.A.D. 954, 981 (EAB 1993); *see also In re Great Lakes Chem. Corp.*, 5 E.A.D. 395, 397 (EAB 1994) (construing Agency agreement with permit applicant’s construction of permit terms binding on Agency). Accordingly, the Board rejects the Towns’ claim that their responsibility under the terms of the permit is unclear, subjecting them to liability for any noncompliance with the permit in areas of the POTW for which the Towns lack ownership and control.

B. The Region Did Not Circumvent the NPDES Permit Application Requirements

Petitioners argue that the Clean Water Act requires those persons who discharge pollutants to have an NPDES permit, and it is this person who also must apply for a permit. Petition at 14. Moreover, it is the permit applicant who then is subject to the NPDES permitting requirements. *Id.* Here, the Towns did not apply for permits to authorize their discharge of pollutants or jointly file an application with Charles River, yet the Region included the Towns as co-permittees to the permit. For the reasons that follow, the Board concludes that the Region reasonably read the permit application requirements to authorize including the Towns as co-permittees without separate permit applications.

The NPDES regulations provide that a person who discharges or proposes to discharge pollutants has an obligation to apply for an NPDES permit to lawfully discharge into waters of the United States. 40 C.F.R. § 122.21(a). Applications for EPA-issued permits to existing POTWs must include the information listed in 40 C.F.R. section 122.21(j); however, EPA may “waive any requirement of [section 122.21(j)] if [the Agency] has access to substantially identical information.” *Id.* § 122.21(j).

1. *The “Duty to Apply” Has Been Met by the Charles River WWTP Permit Application*

As discussed in the previous section, the Board has determined that the Towns are persons engaged in the “discharge of a pollutant” because their satellite sewer systems contribute to the discharge of pollutants from the outfall identified in the Permit. Although the Towns did not apply for permits to authorize their contribution to the discharge, the Towns receive the benefits of the NPDES permit that they are challenging.

EPA regulations are silent as to how satellite collection system owners and operators are to obtain permit coverage for their contributions to the discharge of pollutants. Here, the Charles River wastewater treatment plant operator applied to renew the NPDES permit for the POTW, and discharges from the POTW, including those from the Towns’ satellite collection systems, are covered in the permit issued to the treatment plant. Thus, the Region determined the application from Charles River satisfies the “duty to apply” for a permit for the discharge from the treatment plant in 40 C.F.R. § 122.21(a). The Towns do not dispute that Charles River applied for a permit. They argue, however, that the Towns cannot be included as co-permittees unless they separately apply for a permit. The language of section 122.21(a) does not resolve the question either way, but does specify that “[a]ny person who discharges or proposes to discharge pollutants * * * and who does not have an effective permit * * * must submit a complete application to [EPA] in accordance with this section and part 124 of this chapter.” *Id.* § 122.21(a). That language is susceptible of a reading that, if there are multiple dischargers responsible for the same discharge, as here, then an application from one of the dischargers constitutes an application from all.

Petitioners quote extensively from the NPDES Permit Writers’ Manual and point out that it says nothing about satellite collection systems or suggests that such systems must apply for a permit and that the Region is therefore acting inconsistently with past Agency statements. *See* Petition at 20 (quoting *NPDES Permit Writers’ Manual* at 4-1). Petitioners fail to demonstrate the Region’s interpretation of the application regulations is inconsistent with the Manual. At most, Petitioners show that the Manual, like the regulations themselves, is silent as to the permitting scheme for regionally integrated POTWs. Accordingly, the Board upholds the Region’s interpretation as a reasonable reading of the language of section 122.21(a). *See In re Lazarus, Inc.*, 7 E.A.D. 318, 351-54 (EAB 1997) (discussing deference to Agency interpretations of, *inter alia*, its own regulations).

2. *The Region Appropriately Determined That It Could Waive the Requirement for Separate Applications From the Towns*

As the Region explained, in this case, the information Charles River provided in its application for a permit renewal included sufficient information to determine whether to include the Towns as co-permittees and the permit terms applicable to the Towns. Region's Resp. at 35 ("The Region has determined that requiring a single permit application executed by the regional POTW treatment plant owner/operator will deliver 'substantially identical information' to any application submitted by the Towns." (quoting RTC at 70) (internal quotations omitted)); *see also, e.g.*, Letter from H. Curtis Spalding, Reg'l Adm'r, Region 1, U.S. EPA, to Denis Fraine, Town Adm'r, Town of Bellingham, *Waiver of Permit Application and Signatory Requirements for Municipal Satellite Sewage Collection System 1* (July 23, 2014) ("Waiver Letter to Bellingham"). The Region also informed the Towns that "[i]n the event that EPA requires additional information, it may use its information collection authority" under CWA section 308, 33 U.S.C. § 1318. Waiver Letter to Bellingham 2; *see also* Oral Arg. Tr. at 73 ("In the event there is not [sufficient information for a permit writer, the Region] would request separate applications from the [T]owns.").

This approach – using the information provided in the wastewater treatment plant's permit application that is "substantially identical" to the information the Towns would provide in their applications – not only conserves Agency and applicant resources but also is consistent with the language and purpose behind the waiver provisions in the permit application regulations. *See* 40 C.F.R. § 122.21(j); *see also* National Pollutant Discharge Elimination System Permit Application Requirements for Publicly Owned Treatment Works and Other Treatment Works Treating Domestic Sewage, 64 Fed. Reg. 42,434, 42,440 (Aug. 4, 1999) ("In the proposal for today's rule, EPA acknowledged concerns relating to redundant reporting * * *").⁹ Accordingly, the Region has reasonably

⁹ Waiving duplicative recordkeeping obligations (which includes filing an NPDES permit application) also is consistent with the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§ 3501-3521. One of Congress' stated purposes in enacting the PRA was to "minimize the paperwork burden for * * * persons resulting from the collection of information by or for the Federal Government[.]" 44 U.S.C. § 3501(1). As part of their obligations under the PRA, federal agencies are required to certify to the Office of Personnel Management that collections of information are "not unnecessarily duplicative of information otherwise reasonably accessible to the agency." *Id.* § 3506(c)(3)(B). The Region's determination that it not need obtain separate permit applications from the Towns when the Region has the required information from the WWTP's permit application furthers EPA's efforts under the PRA.

construed the permit application requirements to allow the Towns to waive requirements to submit separate permit applications.

Finally, the permit application requirements also specify that a certifying official must sign the permit application. 40 C.F.R. § 122.21(j)(10). Specifically, the signatory must certify that the information provided in the application is, to the best of the signatory's knowledge, complete and accurate. *Id.* § 122.22(d). Because the Towns are not providing the information, their signatures are not required.

The Towns still argue, however, that the Region lacks the authority under these regulations to force them to be included as co-permittees since they did not apply for a permit. Petition at 16. In some ways, the Towns' argument proves too much. If, as the Towns argue, they cannot be included as co-permittees because they did not apply for an NPDES permit, then but for the Charles River WWTP's permit, the Towns would be discharging pollutants without a permit in violation of the Clean Water Act. This is a case of the Towns wanting to accept the benefit of the permit to authorize their wastewater discharges into the waters of the United States without accepting the burden of the permit. Moreover, such an approach would allow dischargers – including municipalities that currently own both their sewer system and a treatment plant that are subject to an NPDES permit – to eliminate permit requirements for their sewer systems by transferring ownership of the POTW to another entity.

Furthermore, the Towns' interpretation could lead to the Region being unable to address the I/I problems that appear to be preventing the discharge from the WWTP from consistently meeting the effluent limitations in its permit. As stated earlier, the Towns collectively own and manage approximately 95 percent – roughly 227 of 238 miles – of the sewer lines conveying wastewater to the POTW. If the permit application regulations cannot be read as the Region suggests, then the Region would have two basic alternatives to address the I/I concern: (1) deny the permit to the WWTP due to its inability to meet the requirements of the Clean Water Act, *see* 40 C.F.R. § 122.4(d), or (2) take appropriate enforcement action under CWA section 309, 33 U.S.C. § 1319. As the Region said in oral argument, both of these options would appear to be less palatable to the Towns and would be less effective for achieving the goals of the Clean Water Act than making the Towns co-permittees and relieving them of the obligation to submit a separate permit application. The Board does not read the

permit application regulations as requiring the Region to adopt these alternatives.¹⁰

The Towns further argue that, under the Region's approach, satellite system owners will have no way of knowing whether they need to apply for a permit because the Region is requiring some, but not all, satellite collection system owners to be co-permittees. At oral argument, the Region responded that it notified the Towns by "including the member[] communities as a matter of practice" when the Region issued the draft permits. Oral Arg. Tr. at 101. The Board agrees with the Towns that more advance notice would be preferable but finds no legal error in the Region's approach. A better practice would be for the Region to notify potential co-permittees individually of their status, in advance of the permit proceeding, rather than announcing it by issuance of a draft permit because the public comment period may be as short as thirty days, a very limited time in which to learn of the co-permittee status and to comment on a draft permit, including the authority and basis for being included as a co-permittee. *See* 40 C.F.R. § 124.10(b) (providing minimum length of public comment period).

¹⁰ Petitioners and amicus curiae note that EPA developed a proposed regulation, which the EPA Administrator signed in January 2001, that would have explicitly created authority to make satellite collection system owners co-permittees on POTW permits and would have established permit application requirements for such co-permittees. Petition at 26-27; NACWA Br. at 10-11. EPA withdrew the proposed rule prior to its publication in the *Federal Register*. *See* Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001) (requesting withdrawal from the Office of the Federal Register's review and approval "regulations that have been sent to the [Office of the Federal Register] but not published in the Federal Register"). Petitioners and amicus curiae argue, by negative implication, that the existing regulations do not provide such authority. As the preamble to that unpublished proposal makes clear, however, EPA viewed that proposal as a "clarification" of the existing requirements for satellite systems to ensure that authorized State NPDES programs addressed satellite collection systems, including by making them co-permittees, when issuing permits to POTWs. U.S. EPA, National Pollutant Discharge Elimination System (NPDES) Permit Requirements for Municipal Sanitary Sewer Collection Systems, Municipal Satellite Collection Systems, and Sanitary Sewer Overflows 172 (Jan. 4, 2001) (signed proposed rule submitted to the Office of the Federal Register but withdrawn prior to publication), available at http://www.cmom.net/CMOM_nprm_part2.pdf. The fact that EPA withdrew the proposed rule, which sought to establish uniform requirements for satellite systems, does not preclude EPA from determining on a case-by-case basis whether to include satellite systems in a particular NPDES permit. For the reasons discussed in the text, the existing permit application regulations can reasonably be read to authorize the Region's approach here.

C. *The “Permitting Approach” Is Not a Legislative Rule*

Legislative – or substantive rules – are those that implement existing laws and impose a new duty on the regulated community. They are subject to the notice and comment requirements of the Administrative Procedure Act. 5 U.S.C. § 553(b). In contrast, “[i]nterpretive rules are statements as to what the administrative officer thinks the statute or regulation means. * * * Such rules only provide a clarification of statutory language[;] * * * the interpreting agency only reminds affected parties of existing duties.” *Chamber of Commerce of the United States v. OSHA*, 636 F.2d 464, 469 (D.C. Cir. 1980) (internal quotations omitted); *see also* 5 U.S.C. § 553(b)(3)(A) (exempting from notice and comment requirements “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”).

An agency’s characterization of its own rule is not determinative of its interpretive or legislative nature. Rather, “it is the substance of what the [agency] has purported to do and has done which is decisive.” *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 416 (1942). The D.C. Circuit has looked to the effect of the challenged language to evaluate whether an agency intended to clarify or explain existing statutory language and duties or to impose new responsibilities. *Chamber of Commerce*, 636 F.2d at 468-69.

The Region relies on the Permitting Approach, which was attached to the fact sheet for the draft revised permit, as describing the legal and programmatic bases for including the Towns as co-permittees to the Charles River WWTP permit. Petitioners challenge the Permitting Approach as being a legislative rule that did not undergo notice and comment.

The document refers to itself as the Region’s interpretive statement of the Clean Water Act, regulations, and Agency policy regarding NPDES permitting for regionally integrated POTWs. The document states that “it is Region 1’s permitting practice to subject all portions of the POTW to NPDES requirements.” Permitting Approach at *i*; *see also* Analysis at 6 (noting 2001 permit issued to the Massachusetts Water Resources Authority that included co-permittees),¹¹

¹¹ The Region states that in 2001, it included the owners and operators of contributing systems as co-permittees to the Massachusetts Water Resource Authority’s WWTP NPDES permit because the relationship between the Authority and the communities that owned the contributing systems did not allow for an effective inflow and infiltration reduction program. Analysis at 6. The Region further states that it “put municipal satellite collection systems on notice that they would be directly regulated through legally enforceable permit requirements if I/I reductions were not pursued or

7 (“[S]ince 2005, Region 1 has generally included municipal satellite collection systems as co-permittees for limited purposes * * * .”). Twenty-five permits issued by Region 1 include fifty-five satellite collection systems as co-permittees. Analysis at 7.

The document states that efforts between POTW treatment plants and municipal satellite sewer collections systems “fail[ed] to comprehensively address the problem of extraneous flow entering the POTW” and that “[t]he ability and/or willingness of regional sewer districts to attain meaningful I/I efforts in their member communities varied widely.” *Id.* at 6. The Region concluded “that a POTW’s ability to comply with CWA requirements depended on successful operation and maintenance of not only the treatment plant but also the collection system.” *Id.* “Region 1’s general practice will be to impose permitting requirements applicable to the POTW treatment plant along with a more limited set of conditions applicable to the connected municipal satellite collection systems.” Permitting Approach at *i*; *see also* Analysis at 7 (“Region 1 decided that it was necessary to refashion permits issued to regionally integrated POTWs to include all owners/operators of the treatment works.”).

In spite of this “general practice” of co-permitting, the Region’s position is that the approach of designating owners of satellite collection systems as co-permittees is nonbinding and discretionary. Analysis at 7 n.5 (suggesting that Region may also opt to directly regulate satellite collection systems). The Region also solicited comment on the document as part of the administrative record for the revised draft permit.

The Region’s document explains existing authority to regulate the owners and/or operators of collection systems under the NPDES permitting program. The Board agrees that the Region is not imposing a new duty on the satellite collection systems because that duty has always existed. The document merely is “reminding” the systems of their duties under the statute. The timing of the Permitting Approach – over a decade after the Region began classifying owners of municipal satellite sewer collection systems as co-permittees – and its attachment to the Fact Sheet supports a finding that the document is explaining the basis for including the Towns as co-permittees and that the Region has not

achieved.” *Id.* It is unclear whether the Region provided the municipal satellite co-permittees with notice of their proposed status prior to receiving public notice of the draft permit. Letter from Samir Bukhari & Michael Curley, Office of Reg’l Counsel, Region 1, U.S. EPA, to Env’tl. Appeals Bd., U.S. EPA, *Additional Information Regarding Municipal Satellite Systems* Attach. A., at 1 (Dec. 22, 2014).

interpreted the Permitting Approach to create new legal requirements. Since 2001, the Region's practice has been to include the majority of, but not all, operators of satellite collection systems as co-permittees in permits issued to POTW WWTPs that included municipal satellite sewer collection systems. *See generally* Letter from Samir Bukhari & Michael Curley, Office of Reg'l Counsel, Region 1, U.S. EPA, to Envtl. Appeals Bd., U.S. EPA, *Additional Information Regarding Municipal Satellite Systems* Attach. A. (Dec. 22, 2014). Nothing in the document suggests that the Region intended it to be a rule nor intended it to amend any existing rules.

Finally, the "ultimate focus" of the inquiry into whether a rule is interpretive or legislative "is whether the agency action partakes of the fundamental characteristic of a regulation, i.e., that it has the force of law." *Gen. Motors Corp. v. EPA*, 363 F.3d 442, 448 (D.C. Cir. 2004) (quoting *Molycorp, Inc. v. U.S. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999)); accord *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 227 (D.C. Cir. 2007). A rule has the "'force of law': (1) when, in the absence of the rule, there would not be an adequate legislative basis for enforcement action; (2) when the agency has explicitly invoked its general legislative authority; or (3) when the rule effectively amends a prior legislative rule." *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003); *see also Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 112 (1995); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 96 (D.C. Cir. 1997). The Board is not persuaded that the Permitting Approach bears the force of law because there is an adequate basis under EPA's current legislative rules in the document's absence for the Region's practice, and the document does not amend a prior rule. The Region's decision to regulate satellite systems as co-permittees must rise or fall on the statute and the existing regulations themselves, and not on the Permitting Approach. Accordingly, it is not a legislative rule.

V. CONCLUSION

The Board upholds the Region's determinations that the Towns are dischargers under the Clean Water Act and implementing regulations, and that the Region properly read the existing permit application regulations to authorize including the Towns as co-permittees without separate permit applications from them. In so holding, the Board does not rely on the Permitting Approach as providing any additional legal authority beyond the statutory and regulatory regulations it cites. The document does not meet the test for a legislative rule. Finally, "each permittee is *only* responsible for actions with respect to the portions of the collection system that it owns and operates, and is *not* liable for violations

relative to portions of the collection system operated by others.” Response at 48-49.

VI. *ORDER*

The Board denies the petition of Upper Blackstone Water Pollution Abatement District and the Towns of Bellingham, Franklin, Millis, and Medway for review of the Region’s final permit decision for NPDES Permit No. MA0102598 issued to the Charles River Pollution Control District.

So ordered.