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. 14-01

PETITIONERS' REPLY TO REGION 1'S RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

Pursuant to 40 CFR § 124.19(c)(2), the Upper Blackstone Water Pollution Abatement District and the Towns of Bellingham, Franklin, Millis and Medway, Massachusetts ("Petitioners") submit this reply to the United States Environmental Protection Agency Region 1's ("Region 1" or the "Region") September 26, 2014 Response to the Petitioners' Petition for Review. ("Response").

In the face of the Petitioners' legal challenge to the Region's authority to make the Towns "co-permittees" to a NPDES discharge permit, the Region's Response only repeats its positions and conclusively states it has "squarely addressed" and "soundly rejected" the Petitioners' "overly narrow" reading of the Act. Response, p. 2. It has not. By simply repeating its mantra that "satellite systems constitute part of a POTW and are point sources," the Region does not respond to Petitioners' reasoned arguments to the contrary or otherwise assist the Board in reaching a determination on the legal issues presented.

The Region claims that it has "reasonably interpreted" the Act and its regulations and that its approach to permitting reflects an "exercise of discretion." Response, pp. 2, 20, 30, 32 and 37. The Region's interpretation of the law, however, is owed no deference. See *In re ArcelorMittal Cleveland Inc.*, NPDES App. No. 11-01, p. 14, 25 (EAB June 26, 2012) (the starting point for interpreting any statutory language is the statute itself; the degree of deference afforded will vary with regulatory vehicle chosen, citing to *United States v. Mead Corp.*, 533 U.S. 218, 227-38 (2001)). In contrast, see *In re Upper Blackstone*, 14 E.A.D. 557, 585 (May 28, 2010) (substantial deference given to scientific or technical questions). The Region, by continuing to offer a contorted interpretation of the Act and regulations, has not put forward plausible arguments to justify its permitting action.

Underlying the Petitioners' legal challenge is a goal shared by the Petitioners and the Region: to assure proper operation and maintenance of the Towns' sanitary sewer collection systems and, thereby, ensure that wastewater is collected, transported and treated at the POTW treatment plant before discharge to the Charles River. The Towns have made significant capital investments in their collection systems and recognize that their infrastructure must not be compromised by over use, improper maintenance or poor operations. As shown in the Charles River Pollution Control District Infiltration/Inflow Report dated February 24, 2014, Response, Ex. 9, the Towns are making improvements to their sewer systems to reduce I/I and address unauthorized discharges and any associated problems with system capacity.

In seeking to make the Towns "co-permittees" to CRPCD's permit, the Region questions the Towns' and, apparently, the Commonwealth of Massachusetts' commitment to proper management of municipal collection systems. The Region says that the "Petitioners would surely prefer a different permit structure that leaves regulation of the Towns' collection systems solely to the Commonwealth and beyond the reach of the Act." Response, p. 47. Preference is not at issue; jurisdiction is. The Region ignores the statutory and regulatory authority of the Commonwealth, giving no consideration to MassDEP's comprehensive - and legally enforceable – collection system regulations. The Region says "the only or best available option" to address I/I and operation and maintenance of satellite collection systems is to refashion NPDES permits to make owners and operators of satellite systems "co-permittees." Response, p. 11. This is simply not true. As the Petitioners have explained in their comments and in their Petition, by seeking to include the Towns as co-permittees, the Region is acting without authority under the Act and is ignoring its own regulations as well as the mandate of the Act that imposes a "duty to apply" upon those who discharge pollutants to U.S. waters. Further, the Region seeks

to make its "interpretation" of law and regulation a new rule, when such action requires public review and comment.

The Region sets forth and relies upon public policy reasons to explain why the Towns should implement meaningful I/I reduction programs and address potential adverse human health and water quality impacts associated with SSO's, and concludes that the best way to do this would be through NPDES permitting. Response, pp. 10-11. However, by summarily dismissing the MassDEP's newly revised collection system regulations, including a preventative maintenance program that requires plans to identity and mitigate I/I as detailed at 314 CMR 12.04, the Region rejects its own policy considerations, apparently on the sole ground that it is MassDEP, and not the Region, who has authority to enforce them. Response, p. 47. To the extent the Towns may not already be taking steps to address these issues, MassDEP's regulations assure that the Towns must do so through comprehensive and legally enforceable regulatory requirements. Compliance with MassDEP regulations at 314 CMR 12.04 will, in turn, address the policy concerns and real-world impacts that the Region speculates might only be achieved through a federally enforceable "co-permittee" permit.

In sum, the Region has failed to articulate any cogent legal basis for its actions in response to the Petitioners' challenge. The Region lacks legal authority to expand the jurisdiction of NPDES permitting to include the Towns as "co-permittees" and its policy reasoning must also fail in the face of separate regulatory requirements adopted by the state. Despite the Region's policy arguments suggesting unmitigated risk to U.S. waters without the Region's permitting approach, there are, in fact, legally enforceable controls upon collection systems enforced by the Commonwealth. For these reasons, and those set forth in the Petitioners'

Petition and in the reply below, the "co-permittee" provisions in the CRPCD NPDES Permit should be removed.

II. THE PETITIONERS' REPLY TO REGION 1'S RESPONSE[1]

A. The Region's Interpretation of the Act and NPDES Regulations is Contrary to Law; The Towns are Not Owners or Operators of a Point Source Discharging to U.S. Waters.

1. The Region Mistakenly Derives Legal Authority to Regulate Satellite Collection Systems from the Definition of "Treatment Works" at CWA Section 212(2)(A).

The Region fails to address the fact that the definition of "treatment works" and "POTW," upon which the Region relies to say that a satellite collection system owned by one municipality that transports municipal sewage to a POTW treatment plant owned by another is part of a single POTW system, is applicable only to federal grants for construction, not for purposes of permitting discharges under the NPDES program.

First, the Region argues the issue is not raised and therefore waived. Response, p. 22. That is not so. In response to comment # 34, in which the Petitioners state, among other things,

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[1] The Region says Petitioners have "merely repackaged comments made on the Revised Draft Permit, Response, p. 18, failed to rebut the Region's arguments "in a manner deserving review," Response, p. 24, "procedurally defaulted" by restating arguments without confronting the Region's response to comments, Response, p. 26–27, or otherwise "repeated objections." Response, pp. 38, 43. Where, however, the Region's response to the Petitioners' comments on the Revised Draft Permit were to repeat and re-allege the very same arguments the Region made in the Analysis, the Petitioner's legal analysis, as provided in its Petition, is appropriate because the Region's Analysis and its RTC show clear error of law. In accordance with 40 CFR 124.19(a), the Petition sets forth a legal challenge to the Region's authority based findings of fact and conclusion of law that are clearly erroneous.

Moreover, unlike the petitioner in *Michigan Department of Environmental Quality v. U.S. EPA*, 318 F.3d 705, 708 (6th Cir. 2003), cited by the Region, the Petitioners here did not rely upon a four-and-a-half page petition that declared the agency's actions were unauthorized by reference to two appendices. Instead, the Petitioners confronted Region's errors directly in their Petition, which necessarily called for repeating portions of prior legal argument to demonstrate to the Board the Region's errors. Nor is this matter like *LeBlanc v. EPA*, No 08-3049, at 9 (6th Cir. Feb. 12, 2009), aff'g *In re Core Energy, LLC*, UIC Appeal No. 07-02 (EAB Dec. 19, 2007) (Order Denying Review), also cited by the Region, in which petitioners raised concerns regarding liability for damages arising out of the permitting activity and the property rights of adjacent land owners; issues clearly outside the scope of the UIC program. Finally, the Petitioners' claims here are not like those in *In re Knauf Fiber Glass, GmbH*, 9 EAD 1,5 (EAB 2000), also cited by the Region, in which the Board received 65 petitions for review, 64 from citizens or citizens' groups, who opposed the facility, in which most of the petitions did not identify even one particular permit condition as a basis for an appeal.

that the Towns' collection systems have no point source and therefore are not "dischargers," the Region references the definition of POTW and "treatment works" defined by Section 212 of the Act and at 40 CFR § 403.3(q). RTC # 34. The Petition responds to the legal arguments made by the Region in RTC # 34.

Second, while there is no dispute that the term "POTW" is broadly defined, nowhere in its Response does the Region address that the reason the term is so broadly defined so that the federal grants program could provide financing for collection systems as well as treatment plants. Nor does the Region challenge that a Title II definition of the Act does not apply to Title III. Instead, the Region seeks to backtrack from its reliance upon *United States v. Borowski*, 977 F. 2d 27, 30 n. 5 (1st Cir. 1992), cited, at page 22-23 of the Response, to support the Region's claim that the Towns' collection systems are "point sources." While the Region notes that *Borowski* says "courts have upheld this broad interpretation of POTW," the *Borowski* court also states that the broad definition is "so that federal funding for capital cost of publicly owned treatment systems" can be obtained. *Borowski*, 977 F. 2d at 30 n. 5. A broad definition of "POTW" in Title II does not mean the same definition applies to Title III or NPDES permitting requirements. The Region seeks to ignore the plain wording of the Act. Title II definitions are limited to Title II.

The Region also ignores that *Montgomery Environmental Coalition v. Costle*, 646 F. 2d 568 (D.C. Cir. 1980) is contrary to the Region's position. In *Montgomery*, the court states "the broad definition of treatment works in Section 212… [is] an expansion beyond the common meaning of the word, an expansion justified by the context of the federal grant authorizations." 646 F. 2d at 591. The Region would distinguish this case because it relates to combined sewer overflows. But that is immaterial. The *Montgomery* court looked at the very definition of

"treatment works" in Section 212 upon which the Region relies and said "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 for that term in Section 301" – the section of the Act that requires permitting for discharges. *Id.*

Third, while the words "sewage collection systems" and "sanitary sewer systems" do appear in Section 212 (A) and (B), so do the words "used in the storage treatment, recycling and reclamation of municipal sewage or industrial waste." The Towns' satellite collection systems are not used for the purpose of storage or treatment. Rather, the purpose of the Towns' sewer collection systems is to convey wastewater to the POTW treatment plant for storage, treatment and discharge as authorized by the NPDES permit issued to CRPCD.[2]

Fourth, the Region does not respond to the Petitioners' argument that the Region's reliance on 40 CFR § 403.3(q) - to say that satellite collection systems, associated equipment, and the treatment plant itself are all part of one integrated POTW is a point source - is misplaced. 40 CFR § 403.1 sets forth the Agency's pretreatment regulations for industrial discharges to POTWs. By its terms, Part 403 is limited to pollutants from non-domestic sources covered by pretreatment standards indirectly introduced to POTWs. This provision has nothing to do with "discharges" under Section 301(a) of the CWA and as defined by 40 CFR § 122.2.

Instead of addressing the issues raised by the Petitioners, the Region says that it is directed by 40 CFR § 122.2, which states a "POTW is defined at § 403.3(q) of this chapter," which itself references Section 212 of the CWA. EPA, however, adopted the current definition of "POTW" at 40 CFR § 122.2 for reasons that have nothing to do with the Region's argument. The "POTW" definition at 40 CFR § 122.2 was adopted in 2000. 65 Fed. Reg. 30,886 (May 15,

[2] As the Region states: "These systems provide wastewater collection service" that may "not provide treatment … but only convey it to [another] for treatment and final discharge." Response, p. 6.

2000). EPA changed Sec. 122.2 to add references to definitions that are found elsewhere in parts 122, 123, and 403. "[T]he POTW definition that is found in Sec. 403.3 [was adopted] for Sec. 122.2 to achieve better consistency." Id. at 30,888. "The inclusion of such references in a single location 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." *Id*. (emphasis supplied). Consequently, the "POTW" definition at 40 CFR § 122.2 does not give authority to apply the term "POTW" used in a separate subchapter of the Act to the NPDES permit program.

2. The Towns' Collection Systems Are Not a "Point Source."

The Region says the Towns "do not cease to discharge pollutants merely because the pollutants pass through a conveyance" owned by another before reaching U.S. waters. Response, p. 24. The Region further says that "notwithstanding the presence of an intervening point source, the Towns are subject to NPDES permitting because they operate portions of the POTW and discharge to waters of the U.S." *Id*. at 25. The Region cites cases to support its argument that the Towns' satellite collection systems are a "point source" even though they first flow through pipes owned by someone else.

First, none of these cases involves any sort of analogous situation to the municipal satellite collection systems here. *In Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991) *rev'd in part*, 505 U.S. 557, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992), the Second Circuit held that landfill leachate flowing from a pond, through a culvert, and into a wetland was a point source. *In Puerto Rico Campers' Ass'n. v. Puerto Rico Aqueduct & Sewer Auth.*, 219 F. Supp. 2d 201, 208 (D.P.R. 2002), the discharge in question was between two permitted treatment plants, when one treatment plant converted its final discharge to flow into the other plant. A case from 1976 cited by the Region involved failure to meet pretreatment standards when a company

discharged to a city sewer system that directly discharged to the Mississippi River without any treatment. *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945, 949 (W.D. Tenn. 1976). Finally, in *Pepperell Assocs. v. United States EPA*, 246 F.3d 15 (1st Cir. 2001), an oil release from an industrial/commercial building found its way into the city's combined sewer system, and since it occurred during a time of an overflow event, some of the oil went to the treatment plant, but some went directly to a creek. The court found that the facility could reasonably be expected to discharge oil in harmful quantities into or upon navigable waters such that it was required to prepare a Spill Prevention Control and Countermeasures Plan. *Pepperell Assocs.*, 246 F.3d at 23-25. In all of these cases, the discharge being analyzed did not receive any treatment before entering a navigable water. None support the Region's position that the definition of "point source" could be applied to satellite collection systems that convey water to a treatment plant, where such water is then mixed with water from others and treated before discharge to a receiving water in accordance with the treatment plant's NPDES permit.

Second, the Region's arguments are misplaced and rely upon claims and assumptions, not supported, that the Towns "discharge" and own and operate a "POTW" that is itself a "point source." Discharge is defined by 40 CFR § 122.2 to mean "when used without qualification . . . the 'discharge of a pollutant.'" "Discharge of a pollutant", in turn, means "[a]ny addition of any 'pollutant' . . . to 'waters of the US' from any 'point source'." 40 CFR § 122.2. Only by claiming what the Towns actually do - own and operate collection systems that send wastewater to a POTW treatment plant for treatment and discharge to U.S. waters "from a point source" - is something else does the Region's argument have, as first blush, some attraction. The Region claims the Towns "discharge." But as that term is defined by 40 CFR § 122.2 and used for purposes of NPDES permitting, they do not. The Region claims that a collection system is part

of the POTW, which, as shown above, it is not because that definition does not apply. The Region claims that the entire POTW is a "point source," but in so doing, the Region ignores that the only permitted "point source" is the outfall at the POTW treatment plant. Outfall 001, from which "discharge [of] treated effluent" is authorized by the Permit (Part I.A.1., page 2 of 15) and "from" which there is a discharge to U.S waters, is the only "point source." The Towns have no authority over or control of this "point source." The Region's entire logic is flawed.

The Towns have not suggested they "cease to discharge pollutants" because their conveyance systems send waste water to a POTW treatment plant for discharge. Instead, the Towns have said they do not "discharge" as the term is defined by the plain words of 40 CFR § 122.2 and other operative terms. There is nothing to "cease." Nor is there any "intervening point source." There is but one point source, authorized by CRPCD's permit at Outfall 001 for the "discharge of a pollutant." The Towns own and operate only their conveyance systems. They do not, as the Region claims, own or operate a portion of the POTW. Nor have the Towns argued for "an arbitrary limitation" on the reach of the Act and NPDES permitting, "*i.e.*, that the permitted entity must own the actual treatment plant and outfall pipe." Response, p. 26. The Act's prohibition on "the discharge of any pollution by any person," except if provided for under a permit, CWA § 301(a), and the authorization given to EPA to issue permits to "persons" who discharge pollutants, CWA § 402(a)(1), is hardly arbitrary. No matter what artifice the Region seeks to construct, the simple truth is that the Towns are not persons who "discharge" from a "point source."

Finally, Section 301(a) of the Act says: "Except as in compliance with this section and section[] . . . 1342 . . . of this title, the discharge of any pollutant by any person shall be unlawful." Section 402 of the Act (§1342) governs NPDES permitting. Where CRPCD has a

NPDES Permit, and the Town's "discharge" is in compliance with § 1342, the Region cannot say the Towns' discharges need to be permitted.

Similarly, under the Region's reasoning, if the Towns' collection systems are part of a greater publicly owned treatment works as the Region claims, then "discharges" from Towns' collection systems to the treatment works must meet effluent limitations. Section 301(b)(1)(B) of the Act states "for publicly owned treatment works. . . effluent limitations [must be meet] based upon secondary treatment as defined by the Administrator". And if the Towns' collection systems are "point sources," their discharges must also comply with effluent limitations. As required by Section 301(e) of the Act (entitled, "All point discharge source application of effluent limitations"), "[e]ffluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter." None of this is possible, of course, but the Region's reasoning would require it. The Region's analysis leads to illogical results and is based on clear error of law and fact that must be corrected by this Board.

3. The Region Does Not Address Why the Towns are not Indirect Dischargers.

The Region responds to the Petitioners' argument that the Towns should not be deemed "indirect dischargers" under 40 CFR 122.2 by saying in its Response that the Towns' collection systems are not "non-domestic discharges introducing pollutants to a [POTW], but are themselves a portion of the treatment works." Response, p. 27.

First, the Region treats the Towns' conveyance of waste water to the POTW treatment plant as a "direct discharge" under 40 C.F.R. §122.2. But there is nothing "direct" about the Town's "discharge" to the POTW treatment plant. It is not, as the Region must agree, "direct" to waters of the U.S. See definition of "discharge" at 40 C.F.R. §122.2. If it is not a "direct discharge" it must be treated as something else; that something else is an "indirect discharge."

Second, the term "discharge of a pollutant" does not include an addition of pollutants by any "indirect discharger." 40 C.F.R. 122.2. Given that the Towns' discharges includes sanitary sewage and non-domestic wastewater to the treatment facility prior to discharge, there is no reason the Towns may not be deemed "indirect dischargers."

Finally, the Region contends that the Petitioners failed to confront the Region's response that the Towns do not fall within the definition of "municipality" in the definition at 40 CFR § 403.3(q). The Region's contention is incorrect. While the Region acknowledges that the Towns have jurisdiction only over a portion of the system, the Region erroneously concludes that the Towns need not have jurisdiction over the POTW treatment plant if they own or operate other portions of the POTW. Nothing, in the definition of POTW at 40 CFR § 403.3(a) supports this interpretation.

4. The Region Still Has Not Adequately Addressed the Scope and Limits of NPDES Authority.

The Region still has not explained the scope of its NPDES authority, the very question asked by the Board in the *Upper Blackstone* matter over four years ago. The specific question asked by the Board is how far up the collection systems the Region's legal reasoning would allow the Region to impose co-permittee requirements. The Region's response here is the same as provided in its Analysis and RTC. It relies upon the definition "sewage collection system" at 40 C.F.R. 35.905 and says that this definition provides the "test for determining where the POTW ends and users begin." Response, p. 27.

Apart from using a definition of POTW applicable only to federal grants for construction of treatment works (see Part A. 1. above), the Region's error is to avoid answering the Board's question altogether. To say that a POTW is both a "point source" and "discharger" does not logically limit the scope of NPDES Authority to the POTW. If the POTW, as the Region would

define it, consists of all sewer lines, equipment and the treatment plant, is a "point source" there is no reason why all who "discharge" to that point source (other than "indirect dischargers") are not subject to NPDES permitting requirements. The question remains: how far up the collection system does the Region's legal reasoning take its new co-permittee standard. The Region's explanation that a definition used for construction grants is "the entity that is subject to this NPDES policy" does not answer the question. Accordingly, that the Region cannot provide an answer to this question shows the absence of legal authority.

For the foregoing reasons, the Board should remand this matter to the Region with the order to strike the "co-permittee" provisions from the permit.

B. The Region's Explanation of the NPDES Permit Application Process Demonstrates the Absence of Authority to Include the Town's as "Co-Permittees" to the CRPCD Permit.

40 C.F.R. § 122.21(a)(1) requires "any person who discharges . . . to submit a complete application." The Petitioners contend that it is irrational, arbitrary and an error of law and fact for the Region to say, on one hand, that the satellite collection system operators are persons who discharge from a point source, but on the other hand, that they are persons who have no duty to apply for a permit. In its Response, the Region says "it is the operator's duty to obtain a permit," and that an operator of a sewage collection system operating a portion of the POTW "can be asked to submit a separate permit application pursuant to § 122.21(a)." Response, p. 30. The Region's Response, however, does not address the inconsistency noted above and in the Petition.

The "duty to apply" is founded on Section 301(a) ("[e]xcept in compliance with this section and [other sections of this title], the discharge of any pollutant by any person shall be unlawful") and Section 402(a) of the Act (authorizing EPA to issue a permit "for the discharge of any pollutant"). If a person is discharging, it has a duty to apply. If that discharge is covered by

another's permit, then that person has no duty to apply because that person's "discharge" is in compliance with the law. The Towns' discharges are in compliance with the sections of the Act listed in Section 301(a). No permit is required by the Towns for operation of satellite collection systems that convey wastewater for treatment before discharge as authorized by the CRPCD permit.

The Region, however, says that it can ask for a separate permit application pursuant to Section 122.21(a) from a person operating a portion of the POTW, who has not applied. Why? Apparently, because the Region says it can. The Region says regional treatment plants "present[] unique permitting challenges" and acknowledges that "EPA regulations do not specifically address how NPDES permit coverage is to be obtained by satellite collection system components of POTWs." Response, pp. 9, 30. Because the NPDES permit application regulations do not address satellite collection systems, the Region has "crafted an approach to fill in the gap." *Id.* The Region's "gap filling" exercise demonstrates not only the absence of authority to permit the Towns as "co-permittees," but also the need for regulatory authority to do so. See Part C below. Thus, by acknowledging that the regulations do not address satellite collection system permitting, the Region fails to demonstrate how the existing regulations give the Region authority to include the Towns as "co-permittees."

The Region says it has not waived the application requirement to the POTW in its entirety, only as to the operators of the satellite collection systems, and that the POTW treatment plants' application and certification is sufficient to issue a permit. Response, p. 34. Nowhere, however, does the Region state, nor could it, that the POTW treatment plant's application satisfies Towns separate obligations – as "dischargers" – to apply as required by 40 CFR § 122.21(a)(1) ("duty to apply"). If the satellite collection systems are indeed "persons who

discharge from point source," that duty to apply cannot be waived. The Region both rewrites and ignore its own NPDES application regulations. The Board should not allow this clear error of law to occur.

C. The Region's Analysis Is a Legislative Rule Subject to Notice and Comment Because It Expands Operative and Triggering Terms of the CWA and the Regulations, Thereby Expanding The Scope of the CWA and the Regulations.

The Region concludes that the Towns are subject to the Region's permitting requirements pursuant to Sections 301 and 402 of the Act and 40 C.F.R. parts 122 and 124 and stops its analysis short there. Instead of basing its arguments on an analysis of the relevant statutes, regulations, and applicable case law that effectively demonstrate authority for its position, the Region instead largely cites to its own Analysis in support of its arguments. This approach is circular, conclusory, largely non-productive, and highlights the very issue for which Petitioners seek redress from the Board.

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 that the Towns' objection relies on an "overly narrow interpretation" of a "point source." (RTC# 34 and #35). However, the Region fails to acknowledge that the Towns simply do not qualify as "dischargers" as defined by the Act. The Region's authority to regulate municipalities in this way did not exist prior to the Region's Analysis. Interpretation of these terms so as to create authority which would not otherwise exist is exactly what the notice and comment requirements of the APA seek to prevent. *Appalachian Power Company v. Environmental Protection Agency*, 208 F.3d 1015, 1020 (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.")

Simply stating that the Region's Analysis supplies an explanation of statutory and regulatory authority, or "crisper and more detailed lines than the authority being interpreted," as the Region contends, does not automatically render a publication an interpretative rule. *Levesque v. Block*, 723 F.2d 175, 182 (1st Cir. 1983) (finding that the agency's own characterization was important but not conclusive in determining the true nature of a rule). The expansion of these definitions to include the Towns as co-permittees clearly goes beyond the scope of the intended jurisdiction of the CWA. Without its Analysis and corresponding interpretation of the Act, the Region has no basis to subject the Towns to the permitting requirements. As such, its Analysis goes beyond "describ[ing] the Region's current practices and views of the law and 'detail[ing] the legal and policy bases' for prior practices," as alleged by the Region and, therefore, must be subject to the notice and comment requirements of the APA.

D. The Region's Analysis Signals A Region-Wide Change In Policy; It Does Not Reflect a Case-By-Case, Fact-Driven Approach.

The Region repeatedly asserts that its Analysis is a mere explanation of a "case-by-case approach" to making co-permitting decisions. That assertion is misplaced. The Region's Analysis lays out a detailed approach to finding not only that municipalities may now be subject to the NPDES permitting provisions, but also signals the Region's intent to enforce this policy on a Region-wide basis. The Analysis gives new substance to the language of the Act and the regulations in an obligatory fashion, and the Region demonstrates, by its own admission, that it treats the Analysis as "controlling in the field." *General Electric Co. v. E.P.A.*, 290 F.3d 377, 382 (2002). This is evidenced by the Region's issuance, since 2005, of at least 25 NPDES

permits with municipal satellite systems as "co-permittees" and the several draft "co-permittee" permits the Region has pending in reliance on the concepts as outlined in its Analysis. See Analysis, Exh. A and http://www.epa.gov/region1/npdes/draft_permits_listing_ma.html. (The Region does not identify any regional systems that are excluded from its Analysis or that do not include municipal satellite systems as "co-permittees"). In other words, the Region essentially admits to having adopted and implemented a broad policy change that seeks to include municipalities as co-permittees where historically it did not and had no grounds to do so. Because it purportedly outlines the legal and policy bases for its decisions, the Region clearly regards its Analysis as binding, or "controlling in the field." Its Analysis seeks to "explain" the Region's current approach and practice, but the Region completely disregards the fact that the only reason it must explain its policy at this time is simply because it recently changed it.

Moreover, even if the Region's assertion that it reviews permit applications on a case-by-case basis is true, the mere fact that the Region claims that the Analysis provides the agency flexibility, or a case-by-case approach, is not controlling in determining whether its analysis represents a legislative rule. *Id.* As a practical matter, the Region's Analysis expands definitions of the Act and the regulations in a way that imposes obligations on parties not previously subject to regulation and has enlarged its jurisdiction in reliance on these expanded definitions at least 25 times since 2005. Thus, even though the Region alleges that the document merely explains its practice and that ultimately its assessment is made on a case-by-case basis, it is telling that the Analysis, regardless of whether the Region claims it has discretion, is being implemented in a way that binds parties not previously subject to regulation and indicates that it has the force of law.

E. Role of MassDEP Regulations at 314 CMR 12.00.

The Region continues to mischaracterize and take out of context the Petitioners' arguments concerning MassDEP regulations. The Petitioners' argument is that: (1) MassDEP has clear statutory and regulatory authority to regulate the collection systems in question, while Region does not; and (2) MassDEP's authority to regulate has become even more clear with the revisions of 314 CMR 12.00 which include a new section 314 CMR 12.04(2) to replace the MassDEP Policy on Inflow and Infiltration (I/I) referenced in the Region's Analysis.

Contrary to the Region's assertion in its Response, the Petitioners' did substantively confront the Region's responses to comments in its Petition for Review. It is the Region who, rather than address the question of its legal authority, simply cites to its own Analysis as legal authority for the Region to regulate these systems. The Region's Analysis is offered as a regional interpretation of a federal law, but because that federal law controls all EPA Regions it is equally applicable to all EPA Regions.

Further, and contrary to the Region's Response, the Petitioners' statement that MassDEP regulations are better tailored to manage municipal separate sewer collection systems is not an unsubstantiated claim, but rather a statement backed by the lengthy and well documented public process undertaken by MassDEP. MassDEP initially published the I/I Policy referenced in Region's Analysis in 2001. After extensive public outreach and a through regulatory drafting and review process, in 2014 MassDEP replaced its Policy with revised regulations that incorporate enforceable requirements for inflow and infiltration. Those new regulations mandate all sewer system authorities "develop and implement an ongoing plan to control infiltration and inflow (I/I) to the sewer system, … [that must] be submitted to [MassDEP] upon request for review and approval," and that the plan "shall describe the preventative maintenance program that identifies and mitigates infiltration/inflow entering the sewer system in order to prevent all

unauthorized discharges of wastewater, including, but not limited to, sanitary sewer overflows and by-passes due to excessive infiltration/inflow" 314 CMR 12.04(2) (Effective April 25, 2014). Sewer system authorities must develop and implement the I/I identification and elimination program as part of municipal operation and maintenance procedures by 2017. *Id.*

Importantly, the Region in its Response concerning MassDEP now offers an alternative basis for its Analysis. Previously, the Region stated its Analysis provides the legal basis for its authority to regulate such municipal systems. Now, however, in response to Petitioners' arguments about MassDEP's regulations, the Region describes its approach as a "matter of policy discretion...to impose permit conditions on owners of satellite collection systems…" Responses at page 47. That change is nowhere supported in the record. Moreover, there cannot be "permit conditions" upon parties who are not permittees and the Region cannot ground its claim to regulate the Towns on this theory.

Finally, the Region says the Petitioners have failed to explain how the existence of state regulations regarding sewer systems "diminishes EPA's authority to impose permit conditions." Response, p. 47. The Region, however, misses the point. The Region has no authority to diminish. Because MassDEP's new comprehensive, enforceable regulatory requirements address I/I management concerns the Region specifically raised as a concern (see Response, pp. 7- 8, 10), its policy reasoning to "refashion" NPDES permits to impose operation and maintenance requirements upon the Towns as "co-permittees" must fail. The Board should strike the "co-permittees" provisions from the CRPCD NPDES Permit.

III. CONCLUSION

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,
Millis and Medway
By its Attorneys

/s/ _____

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STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this reply contains less than 7,000 words.

/s/
Robert D. Cox, Jr.

Date: October 14, 2014

CERTIFICATE OF SERVICE

I, Robert D. Cox, Jr., hereby certify that on this 14th day of October, 2014, I served a copy of the foregoing Reply to Region 1's Response to Petition for Review on the parties identified below by electronic mail and U.S. first class mail, postage prepaid.

By Electronic Filing:

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/s/
Robert D. Cox, Jr.

REQUEST FOR ORAL ARGUMENT

Petitioners, the Upper Blackstone Water Pollution Abatement District and the Towns of Bellingham, Franklin, Millis and Medway hereby request that the EAB schedule oral argument in the above-captioned matter. Oral argument would assist the EAB in its deliberation on the issues presented in this case. The matter is the first permit appeal to the EAB following its 2010 remand decision in *Upper Blackstone*, in which the EAB asked the Region to respond to a series of questions on its effort to make satellite collection system communities "co-permittees" under the NPDES program. As such, the issues presented here are of first impression. The nature legal issues raised are complex such that oral argument would likely assist the EAB's review. The public policy concerns underlying the arguments would be best addressed through question-and-answer provided through oral argument. For these reasons and others specified in its Petition and in this Reply, the Petitioners respectfully request that the EAB schedule oral argument in above-captioned matter.