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

In re:	)	
CHARLES RIVER POLLUTION CONTROL DISTRICT	)	NPDES APPEAL NO. 14-01
NPDES Permit No. MA 0102598	)	

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES

I. Preliminary Statement

The National Association of Clean Water Agencies ("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, including Upper Blackstone Water Pollution Abatement District, one of the Petitioners in this case. NACWA's membership includes numerous municipalities and municipal entities that manage publicly owned treatment works (POTWs), sanitary and stormwater sewer systems, water reclamation districts, and all aspects of water collection, treatment, and discharge. NACWA members have a substantial interest in this case. The Board is being asked to set aside provisions of the National Pollutant Discharge Elimination System ("NPDES") permit for the Charles River Pollution Control District (CRPCD) that apply to co-permittees.[1] The Board's decision in this matter will directly affect a substantial number of

[1] The nature of this challenge is one of legal interpretation and not technical; thus Region 1's position is not entitled to deference. *Compare In re Upper Blackstone Water Pollution Abatement Dist.*, 14 E.A.D. 577, 585 (May 28, 2010) ("a petitioner seeking review of issues that are technical in nature bears a heavy burden because the Board generally gives substantial deference to the permit issuer on questions requiring scientific or technical judgment.).

NACWA's members, including those currently applying for NPDES permits, or that may do so in the future, and those that operate satellite collection systems. Therefore, NACWA respectfully submits this brief under 40 C.F.R. §124.19(e) to facilitate the Board's decision and support the removal of co-permittee provisions from the CRPCD NPDES permit.

II. Introduction and Background

In this matter, Region 1 of the Environmental Protection Agency ("Region 1" or the "Region") decided that it wanted to address inflow and infiltration ("I/I") upstream of a POTW by making the towns of Franklin, Medway, Millis and Bellingham, Massachusetts (the "Towns"), who are owners of upstream satellite collection systems, "co-permittees" of the discharging POTW. Region 1 is now trying to justify that outcome, using a tortured reading of the regulations to apply them in a way that runs counter to the traditional NPDES permitting process. The Region first tried this in the *Upper Blackstone* case – an attempt that the Board did not support[2] - and the Region's latest attempt to include the Towns in the NPDES permit for the CRPCD likewise fails. Region 1's selective application of regulatory definitions is not supported by law and leads to absurd results. While I/I is a problem which requires a solution, such a solution must not be derived from contorting the current statute and regulations in order to fit Region 1's desired outcome.

The previous *Upper Blackstone* permitting matter that was before this Board is a direct precursor to the issue on appeal and is important history to review to help inform the Board of the Region's continuing arbitrary attempts to include co-permittees in NPDES permits. In *In re*

[2] *See In re Upper Blackstone Water Pollution Abatement District*, NPDES Appeal Nos. 08-11 to 08-18 & 09-06, 14 E.A.D. 577 (Order Denying Review in Part and Remanding in Part, May 28, 2010), available at: http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/NPDES%20Permit%20Appeals%20(CWA)/F22DB97558D954F2852578E00070F961/$File/Upper%20Blackstone.pdf.

Upper Blackstone, Region 1 attempted to include co-permittee requirements for satellite collection systems in the NPDES permit for Upper Blackstone Water Pollution Abatement District ("UBWPAD"). These requirements were challenged before this Board, which asked the same basic question that is again before it in this appeal:

> the central issue regarding the co-permittee requirement is: did the Region satisfactorily articulate a rule-of-decision, or interpretation, for expanding the Permit to encompass separately owned and operated collection systems that discharge into the District's Treatment Plant and identify a sufficient statutory and regulatory basis for that expansion?

In re Upper Blackstone, 14 E.A.D. at 587. In that 2010 decision, the Board ultimately held:

> the Region has not sufficiently articulated in the record of this proceeding the statutory, regulatory, and factual bases for expanding the scope of NPDES authority beyond the treatment plant owner and operator to separately owned and operated collection systems that do not discharge directly to waters of the United States, but instead that discharge to the treatment plant.

Id. at 578. The Region then removed the co-permittee provisions from that permit, and the revised permit was upheld by the Board in 2011. *In re Upper Blackstone Water Pollution Abatement District*, NPDES Appeal Nos. 10-09, 10-10, 10-11, and 10-12, 14 E.A.D. __ (Order Denying Review, March 30, 2011).

The next year, in 2012, the Region issued a partially revised draft permit for the CRPCD that included as an attachment: "Analysis Supporting EPA Region 1 NPDES Permitting Approach for Publicly Owned Treatment Works that Include Municipal Satellite Sewage Collection Systems" (hereinafter, "Region's Analysis"). This attachment to a draft permit purported to answer the questions to which the Region had no, or an unsatisfactory, response during the *Upper Blackstone* challenge.

The Region's Analysis clearly shows the difficulty that the Region had, and still has, in justifying its position. For example, the Region admits that they are now taking a position

different than it did in the *Upper Blackstone* challenge. When explaining its reasoning for why a collection system "discharges a pollutant," the Region states:

> This position differs from that taken by the Region in the Upper Blackstone litigation. There, the Region stated that the treatment plant was the discharging entity for regulatory purposes. The Region has clarified this view upon further consideration of the statute, EPA's own regulations and case law and determined that a municipal satellite collection system in a POTW is a discharging entity for regulatory purposes.

Region's Analysis at n.10.

The Region also tries to downplay the significance of its Analysis by stating that it is merely "reframing" permits to include satellite collection systems and that this "does not represent a break or reversal from its historical legal position." *Id*. at 7. It strains credulity that the Region positions itself as merely "reframing" permits, when it is actually taking a giant leap to regulate systems in a manner not envisioned by statute nor requested by a permit applicant – and the Region justifies taking this leap in a document attached to a revised draft permit, not through any sort of formal action subject to notice and comment.

As described herein, the Region's justification for making satellite collection systems co-permittees in NPDES permits fundamentally changes the structure of NPDES permitting. Satellite collection systems are not expressly regulated by the NPDES permitting program. If EPA had wanted to include them, it could have done so through the rulemaking process, as it has done in other situations. Region 1's approach may help it deal with I/I, but its approach involves the selective application of regulatory requirements that only leads to further issues when trying to logically extend the Region's position to other systems, choosing which substantive requirements to apply, and deciding how to ensure appropriate enforcement of co-permittee provisions. Since there is no sound legal justification for including satellite collection systems as

co-permittees, NACWA urges the Board to remove the co-permittee provisions from the CRPCD permit.

III. Region 1's Approach Fundamentally Changes the Structure of NPDES Permitting Under the Clean Water Act

A. Overview of the NPDES Permitting Process in the Clean Water Act

The focus of the permitting program of the Clean Water Act has always been at the "end of the pipe." The Act is framed around the central provision that "the discharge of any pollutant shall be unlawful," except if provided for under a permit, and that a "discharge of a pollutant" is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12), (16). While these definitions in practice can be quite expansive, the base perspective is that a pollutant cannot come from a point source into a navigable water unless it is specifically allowed, *i.e.* permitted.

Subchapter IV of the Act deals with Permits and Licenses, specifically Section 402 contains the NPDES program provisions. 33 U.S.C. § 1342. The whole program is structured around the concept that it is the owner or operator of a treatment works facility or the ultimate discharger that is the permittee. *See id*; 40 C.F.R. §§ 122, 124. As described in U.S. EPA's NPDES Permit Writer's Manual:

> The NPDES regulations at Title 40 of the Code of Federal Regulations (CFR) 122.21(a) require that any person, except persons covered by general permits under § 122.28, who discharges pollutants or proposes to discharge pollutants to waters of the United States must apply for a permit. Further, § 122.21(e) prohibits the permitting authority from issuing an individual permit until and unless a prospective discharger provided a complete application. This regulation is broadly inclusive and ties back to the Clean Water Act (CWA) section 301(a) provision that, except as in compliance with the act, "…the discharge of any pollutant by any person shall be unlawful."
>
> In most instances, the permit applicant will be the owner (e.g., corporate officer) of the facility. However, the regulations at § 122.21(b) require that when a facility

> or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit. The regulations also require the application to be signed and certified by a high-ranking official of the business or activity. The signatory and certification requirements are at § 122.22.

Section 4.1, available at: http://water.epa.gov/polwaste/npdes/basics/upload/pwm_2010.pdf (last accessed October 7, 2014); *see also*, U.S. EPA Office of Wastewater Management - Water Permitting, "Water Permitting 101," available at: http://water.epa.gov/polwaste/npdes/basics/upload/101pape.pdf (last accessed October 7, 2014).

Likewise, Subchapter III of the Act, Standards and Enforcement, sets out different effluent limits based on whether the discharger is a POTW. 33 U.S.C. § 1311(b). All POTWs must meet secondary treatment standards; all other point sources must meet certain technology control levels or, if the point source discharges to a POTW, then it must meet pretreatment standards. *Id*. Again, the focus is on the ultimate discharger.

The Region argues that the Petitioners put too much emphasis on the POTW that intervenes between the satellite collection system and the ultimate discharge to a water of the United States. Resp. at 18. However, the Region's logic appears to ignore the POTW altogether by saying that regardless of the presence of the POTW, the satellite collection systems are permittees. Resp. at 19. The Region's logic further ignores that the POTW is explicitly held to discharge standards to demonstrate that all the water it treats, including flow it receives from the satellite collection systems, is not an unpermitted discharge of a pollutant at the time it goes into the Charles River.

Throughout the Region's Analysis, it erroneously relies on the pretreatment program as supporting its co-permittee approach. *See, e.g.*, *id*. at 10 ("The Region's interpretation articulated here is consistent with the precepts of the pretreatment program . . . ."); *see also* n.5, n.9. Unlike satellite collection systems, sources subject to the pretreatment program are

specifically addressed in the Clean Water Act, through the separate pretreatment program under Section 307. Under that provision and EPA's implementing regulations, the facilities that send their wastewaters to POTWs are specifically excluded from the NPDES permitting process, and are instead covered by detailed, specific pretreatment standards. There is nothing in the language of Section 307, however, to suggest that the existence of pretreatment standards somehow empowers EPA to require satellite systems be included as co-permittees in NPDES permits. The two situations are not analogous and the Region's reliance on the pretreatment program to justify its actions is entirely misplaced.

B. Satellite Collection Systems Co-Permittees Are Not Covered by the NPDES Program

In order to make the Towns' satellite collection systems fit within the CRPCD NPDES permit, Region 1 relies on a convoluted reading of the Act that first looks to Subchapter II to include these satellite systems within the definition of POTW, but then also makes the argument that the intervening POTW does not matter and that the satellite systems are themselves dischargers of pollutants to a water of the United States. Resp., *passim*. Each of these arguments is forced and awkward, with Region 1 trying to impose co-permittee requirements on systems in a manner the Act does not authorize.

As stated by the Petitioners, it is improper in this context to apply the definition of POTW from Subchapter II of the Act to Subchapter III. Pet. at 9-11. Subchapter II deals only with Grants for Construction of Treatment Works. 33 U.S.C. § 1281(a) ("the purpose of this subchapter [is] to require and to assist the development and implementation of waste treatment plans and practices which will achieve the goals of this chapter."). It does not at all address discharges of pollutants. Subchapters III and IV of the Act address discharges and do so by focusing on the actual treatment works or ultimate discharger. *See* Section III.A, *supra*.

It is understandable how the Region came up with its argument – it needed a way to extend the reach of the POTW to the collection systems, and Subchapter II was the only place that provided language that, without context, supported its position. However, Subchapters III and IV are the applicable provisions for discharges and discharge limitations, which are at issue here. How Congress defined a POTW for the purpose of construction grants has no bearing on how collection systems may be addressed for purposes of permitting, as indicated by the permitting provisions being in an entirely separate part of the statute.[3]

The Region then makes the argument that the satellite collection systems are themselves discharges of pollutants to a water of the United States. Resp. at 23-24. Its reasoning here is forced, just as with the prior argument. It is critical to understand that the Towns discharge to a POTW and then the POTW, after treatment, is the ultimate discharger – this is what is contemplated by the law. There is no direct discharge from the Towns to a jurisdictional water body, only the passage of wastewater via pipe from the Towns to the POTW.[4] *See* Section III.A, *supra*. If the Towns were industrial dischargers and not municipalities, they would be subject to pretreatment standards for indirect dischargers. *See* 40 C.F.R. § 122. The only difference here is that the owner of the pipe is municipal, not industrial; the place in the line of discharge is the same. The problem is that the statute does not provide equivalent requirements for municipal indirect dischargers. To solve this problem, Region 1 has reached over to Subchapter II to try to force a POTW to extend hundreds of miles

[3] The cross-references in the definition of POTW were a regulatory change in 2000 as part of EPA's effort to "remov[e] redundant or superfluous language" and streamline the NPDES regulations. 65 Fed. Reg. 30886 (May 15, 2000). These cross-references do not serve to import substantive requirements from one subchapter into another and were "not intended to expand the application of those definitions." *Id.* EPA adopted "the POTW definition that is found in § 122.2 to achieve better consistency." *Id.*

[4] If the Towns discharged directly to a jurisdictional water body, say from a sewer overflow discharge point, the permitting question might be different. But that factual scenario is not present here nor at issue in this appeal.

and over multiple jurisdictions to pull satellite systems within the NPDES permit. Resp. at 20. That is a quite a stretch.

Without the Towns being dischargers and without them being part of a permitted facility, these systems do not fall under the NPDES permitting umbrella. Just because they are not regulated does not mean that Region 1 should be allowed to creatively read and construct the statute to create a new co-permittee regulatory program.[5] Where I/I needs to be addressed in collection systems such as these, the states can, and have, filled this role.[6] Here, the Commonwealth of Massachusetts has recently adopted new regulations that cover Operation, Maintenance and Pretreatment Standards for Wastewater Treatment Works and Indirect Dischargers. 314 CMR 12.00 – 12.12. These regulations allow the state to directly regulate I/I in collection systems. *Id.*

C. When EPA Has Wanted to Allow Co-Permittees, It Has Done So Through Rulemaking

The Region's machinations to explain why it thinks it has co-permitting authority over the Town's satellite collection systems only serve to demonstrate why no such authority exists – if EPA wanted to approach permitting these systems as co-permittees with the municipality that owns and operates the POTW, EPA would have explicitly done so, as it has in other contexts. More specifically, EPA does allow co-permittees in the context of regulating municipal separate storm sewer systems ("MS4s"). *See* 40 C.F.R. § 122.33. Joint permits are allowed in the MS4 program, to aid the smaller systems with compliance. The program was established so that small MS4s "each would not have to develop their own storm water

[5] For example, non-point sources are not subject to permitting requirements, yet they can contribute to water quality issues.

[6] In addition to state action, many NACWA members have also taken proactive steps with their satellite collection systems to address I/I concerns, including entering into service agreements with satellite systems, establishing contractual arrangements, and pursuing regionalization efforts. These types of solutions that allow treatment agencies and their satellite systems to find tailored approaches that work best for their communities are far more effective than the rigid, one-size-fits-all approach being pursued by the Region here.

management program," and it "allows small MS4s to ease the burden of creating their own programs." 64 Fed. Reg. 68768-769 (December 8, 1999). A permittee must indicate in its Notice of Intent for permit coverage or in its permit application that it intends to be a co-permittee. *Id.*

Thus, co-permittees are allowed in the MS4 context because there was a benefit to the overall compliance for the smaller systems, and, more importantly, the entities involved are regulated. *Id*. Here, there are no similar supporting circumstances. As explained above, there is no authority under the NPDES program to regulate these satellite systems as co-permittees. Section III.B, *supra*.

If EPA wanted to truly allow co-permittees in this NPDES context, it could have done explicitly, as it did with MS4s. *See* 40 C.F.R. § 122.33. Those regulations explain the purpose and circumstances for being a co-permittee, and the intent to be a co-permittee is initiated by the regulated entity, not by the Region. Here, the only thing that brings a satellite collection system into the fold of the POTW permit is the Region's convoluted justification that the permit application was "waived." Resp. at 35. With the MS4 program, the co-permittee approach is an opt-in program. But here it is subject to the Region's faulty rationale that if a municipality is a satellite collection system, it is, without choice, a *de facto* co-permittee. The Region's back-door approach to imposing a co-permittee system runs counter to how EPA has applied such permits in other CWA programs.

In 2001, the EPA did start a rulemaking that proposed regulating satellite collection systems as co-permittees. *See* Proposed Capacity, Management, Operation And Maintenance (CMOM) Standard Condition For Municipal Sanitary Sewer Collection Systems, U.S. Envtl. Prot. Agency, (Jan. 4, 2001), *available at* http://www.cmom.net/CMOM_nprm_part2.pdf (last

accessed October 9. 2014). This rulemaking was withdrawn with the change in Administration, and EPA has never sought to reintroduce it. *See* 66 Fed. Reg. 7702 (Jan. 24, 2001). There is no basis for Region 1 to pursue a permit-by-permit implementation approach on an issue where the EPA previously sought rulemaking authority.

D. Allowing Region 1's Approach to Stand Leads to Absurd Results

Region 1's position that the Towns are proper co-permittees is based on two erroneous approaches: 1) that the Town's satellite systems are part of the POTW; and 2) that these systems are point source discharges. While both of these may serve to address the Region's need here of justifying its co-permittee provisions, these approaches raise other issues and cause more problems when trying to logically extend their applications. The Region states in the same breath that "the Towns are subject to 'binding' requirements as co-permittees" but that what they are held to is based "only then upon consideration of site-specific facts pertaining to the collection systems' performance." Resp. at 39. It cannot be both. Such statements by the Region underscore the practical problems presented by its inconsistent position.

For the first approach, if the Board accepts the Region's position that it can look to a separate program under the Clean Water Act to include the Towns as part of the POTW NPDES permitting process, the Region has not articulated a basis for determining when a satellite system will be included as a co-permittee and when it will not. The Region states that the collection system begins at the point where it collects water from others, but it does not provide a basis for when the collection system warrants inclusion under the permit. *See* Region's Analysis at 11. It merely states that it is "a fact-based decision based on existing statutory and regulatory authority." Resp. at 13, 39. The Region's Analysis mentions that including satellite systems as co-permittees may be necessary when there are high levels of I/I

that may dilute the incoming wastewater and increase hydraulic loads, but the Region points to no objective parameters for making this determination, let alone any regulatory support for this criterion. *See* Region's Analysis at 15. Thus, municipalities that have satellite collection systems are left without any guidance or objective standard as to when the Region will, solely at its discretion, determine that their I/I levels are high enough to warrant pulling the satellite systems into another municipality's NPDES permit.

For the second approach, if satellite collection systems are themselves point source discharges into a navigable water of the United States, then the Region is taking an improper position on the substantive requirements that apply to those. The statute is clear – if a system is a POTW, it must comply with secondary treatment standards; all other point sources must meet certain control technology-based requirements, or, if the point source discharges to a POTW, then it must meet pretreatment standards. 33 U.S.C. § 1311(b). If the satellite systems are point sources, regardless of the intervening treatment plant, then they either must meet the technology-based requirements or pretreatment standards. *Id.* Since they are not industrial discharges, pretreatment standards do not apply (*see* 40 C.F.R. § 122), leaving only technology-based limits.

Yet, none of the above was applied to the Towns in the CRWPD permit. The Towns are subject only to certain operations and maintenance provisions related to the collection systems. *See*, CRPCD NPDES Permit, Part I.C. There is simply no basis for this in the regulations. Again, satellite collection systems are not directly addressed under the NPDES program. *See* Section III.B, *supra*. Region 1 has pulled out its mallet and tried to pound the satellite systems into the definition of POTW or that of a "point source," but doing so only leads to the arbitrary

imposition of only certain requirements that the Region elsewhere describes as "binding." Resp. at 13, 39.

Moreover, as was a concern in the *Upper Blackstone* matter, there are questions as to how these co-permittee provisions could be enforced. The Region tries to reassure the Petitioners that Region 1's position is that co-permittees are only responsible for the collection system each owns. Resp. at 48. However, there is no regulatory basis for this liability. Without a regulatory basis that establishes the rights and responsibilities for co-permittees, they must rely on the permit drafting of the Region to clearly state this in the permit, and imprecise language could lead to unintended enforcement actions or actions by third parties.

In all, Region 1's position leads to potentially absurd outcomes when trying to determine which systems would be included as co-permittees, which substantive requirements apply, and in how to ensure appropriate enforcement of co-permittee provisions.

IV. Conclusion

NACWA urges the Board to strike the co-permittee provisions from the CRPCD NPDES permit. The NPDES permitting process does not authorize the Region's inclusion of co-permittees. The Region's attempt in this instance to fit the Towns' satellite collection systems into definitions of POTW and of "point source" is awkward at best and, at worst, does violence to the basic NPDES permit structure in the Clean Water Act. NACWA recognizes that I/I is an issue that needs to be addressed – and which is being addressed actively by its members. NACWA also welcomes further dialogue with EPA on how to resolve I/I concerns in a regulatory fashion, whether through state regulation, further federal action, or other means. But until there is further legislative or regulatory action, the Board should not allow Region 1 to move forward with imposing co-permittee requirements on a permit-by-permit basis, without any legal foundation.

Respectfully submitted,

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STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this Brief of *Amicus Curiae*, including all relevant portions, contains less than 7,000 words in accordance with 40 C.F.R. §124.19(d)(3).

/s/
Frederic P. Andes

Date: October 14, 2014

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief of *Amicus Curiae* National Association of Clean Water Agencies, in the matter of Charles River Pollution Control District, NPDES Appeal No. 14-01, was served on the following persons in the manner indicated:

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